Supreme Court
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In The

Supreme Court of the United States

EDWARD A. AND DORIS ZELINSKY,

Petitioners,

v.

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK et al.,

Respondents.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) On days when New York's "convenience of the employer" rule risks double taxation of nonresident telecommuters for working at their out-of-state homes, does that rule, and the risk of double taxation the rule causes, violate the Commerce Clause?

2) On days when New York's "convenience of the employer" rule risks double taxation of nonresident telecommuters for working at their out-of-state homes, does that rule, and the risk of double taxation the rule causes, violate the Due Process Clause?

LIST OF PARTIES

The petitioners are Edward A. and Doris Zelinsky, of New Haven, Connecticut. The respondents are the Tax Appeals Tribunal of the State of New York and the Commissioner of Taxation and Finance of the State of New York.

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PETITION FOR A WRIT OF CERTIORARI

Edward A. and Doris Zelinsky respectfully petition for a writ of certiorari to review the judgment in this case of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals (App. 1-14) is officially reported at 1 N.Y.3d 85 and is also reported at 801 N.E.2d 840 and 769 N.Y.S.2d 464. The opinion of the Supreme Court of New York, Appellate Division, Third Department (App. 15-22) is officially reported at 301 A.D.2d 42 and is also reported at 753 N.Y.S.2d 144. The opinion of the Tax Appeals Tribunal of the State of New York (App. 23-46) is not officially reported. The opinion of the Administrative Law Judge (App. 47-80) is not officially reported.

JURISDICTION

The judgment of the New York Court of Appeals was entered on November 24, 2003. The jurisdiction of this Court rests on 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., Art. I, Section 8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const., Amend. XIV, Section 1, provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law."

The relevant portions of the New York Codes, Rules and Regulations are set forth at App. 85-87.

STATEMENT OF THE CASE

1. Summary. The petitioner[1] is a law professor who teaches in New York on some days and writes, researches and grades at home in Connecticut for the rest of the week. In this case, New York double taxed the petitioner for working at home by taxing the salary apportionable to the days he worked at home in Connecticut and paid Connecticut income tax.

New York bases its double taxation of nonresident telecommuters[2] like the petitioner on the legal fiction

[1] Doris Zelinsky is a petitioner in this proceeding solely because she filed a joint return with her husband for purposes of the New York nonresident income tax. In the interests of clarity, this petition shall refer to the petitioner Edward A. Zelinsky because it is only the tax treatment of his professorial salary from the Cardozo Law School which is at issue.

[2] The New York Court of Appeals has characterized a telecommuter as an employee who "inhabits today's 'virtual' workplace linked by Internet connections and data exchanges." *In the Matter of Maxine Allen*, 100 N.Y.2d 282, 288 (2003). Modern technology (such as Lexis, Westlaw, the Internet, email and fax machines) permits a law professor like the petitioner to undertake research at home. At the beginning of

(Continued on following page)

propounded by New York's "convenience of the employer" rule. Under that fiction, New York classifies as New York days those days on which a nonresident actually works at his out-of-state home on the ground that his presence at home is for his personal convenience rather than for his employer's necessity. New York thereby taxes the income attributable to that out-of-state day by pretending (as it does in this case) that that day is worked in New York when in fact it is not.

New York's "convenience of the employer" rule and the widespread risk of double taxation it systematically creates for thousands of nonresident telecommuters on days they work at home have been widely condemned by prominent commentators as unfair, irrational and unconstitutional.

The opinion of the Court of Appeals in this case sustains New York's "convenience of the employer" rule and the double taxation of nonresident telecommuters like the petitioner for working at home. In doing so, the decision below disregards the case law of this Court under the Commerce and Due Process Clauses. To minimize the risk that multiple States will tax the same income, this Court's case law requires States both to apportion income and to avoid extraterritorial taxation. Such apportionment must assign to each State in which income-producing activity occurs that State's proper share of the taxpayer's income based on the taxpayer's actual in-state activity. In this case, New York, in violation of these well-established

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his career, this research would have required the petitioner's physical presence in the library.

constitutional rules, disregarded the petitioner's actual activity at home in Connecticut and instead taxed all of the petitioner's salary, including the salary the petitioner earned working at home in Connecticut.

The opinion of the Court of Appeals conflicts with the decisions of other State courts interpreting and applying the case law of this Court to avoid the risk of multiple taxation under the Commerce and Due Process Clauses. Most notably, the decision below conflicts with the decision of the Pennsylvania Supreme Court in *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*.

The opinion of the New York Court of Appeals in this case condones the systematic efforts of the respondent Commissioner of Taxation and Finance to impose double taxation throughout the country on thousands of nonresident telecommuters who, like the petitioner, work at home, often hundreds of miles from New York. As a practical matter, these nonresidents have no effective remedy for their constitutional rights since the New York courts have, by the decision below, made clear that they will continue to assess double tax under the employer convenience fiction until this Court tells them otherwise.

New York plays a strategic role in the nation's economy with consequent visibility for New York's tax practices. The decision below, if left standing, will cause other States to emulate New York's aggressive double taxation of nonresident telecommuters on the days such telecommuters work at their out-of-state homes. Unless this Court intervenes, the political temptation to impose unconstitutional double taxation on telecommuting nonresidents, i.e., nonvoters, will prove irresistible.

The opinion of the New York Court of Appeals conflicts with emerging national policy encouraging telecommuting. The "convenience of the employer" rule systematically double taxes thousands of nonresident telecommuters like the petitioner for working at home. This rule and the double taxation it causes are singularly ill-suited to a modern, information-based economy which encourages individuals to use contemporary technology to work at home – whether that double taxed telecommuter is a parent seeking to balance the demands of family and employment by working at home, a law professor with a working spouse and school age children, a disabled individual enabled to work more productively through telecommuting technology, or simply an individual seeking to utilize the flexibility of modern technology by working at home.

2. Petitioner's days worked at home. The facts of this case are fully stipulated and are typical of the thousands of individuals who work for New York employers, who telecommute for part of the week from homes outside New York and who are systematically double taxed for working at home by New York's "convenience of the employer" rule. *See* Stipulation of Facts (App. 81-84). The petitioner, Edward A. Zelinsky, is a Connecticut resident and a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University in Manhattan. His duties for the Cardozo Law School include teaching, meeting with students, grading, research and writing.

The petitioner taught his classes and met with students on the days he spent in New York at the Cardozo Law School. He did his grading, research and writing at home at his principal residence in New Haven, Connecticut and at his summer residence in Branford, Connecticut.

As indicated by the stipulations, the petitioner spent a majority of his working days working at home in Connecticut on his scholarship and grading.

3. Connecticut's resident income tax. Since 1991, Connecticut has imposed an income tax on its residents' worldwide incomes.[3] Connecticut grants a credit against its resident income tax for taxes paid to another State for income earned in that State. Connecticut (quite properly) does not grant a credit for nonresident income taxes assessed by another State for income derived from work performed in Connecticut.[4]

4. New York's nonresident income tax. New York levies an income tax on nonresidents who have income from New York sources. Generally, for a day when a nonresident of New York works for a New York employer outside of New York, New York apportions that day's income to the State in which the nonresident actually works. New York thus levies no tax as to that out-of-state day and the income attributable to it. However, on a day when a nonresident works at his out-of-state home, New

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[3] As noted *infra*, New York's "convenience of the employer" rule would create an unconstitutional risk of multiple taxation even if Connecticut had no income tax of its own or if Connecticut granted a credit against its income tax for New York tax assessed under that rule.

[4] *See* Gene Gavin and Stacey Pavano, "The Long Arm of the Empire State: Convenience Rule Discourages Interstate Telecommuting," 12 *J. of Multistate Taxation and Incentives* 7, 11-12 (March/April, 2002) (discussing the justified refusal of states like Connecticut to extend credits for New York tax assessed under the employer convenience rule and the resulting double tax in situations like the present case when telecommuters work at their out-of-state homes). Mr. Gavin was Connecticut's Commissioner of Revenue Services during the years at issue.

York, under the "convenience of the employer" fiction, treats that out-of-state day for income tax purposes as spent in New York, even though it in fact is not. New York thereby taxes the income earned on such an out-of-state day worked at the nonresident's home, despite the resulting risk of double taxation.

5. Petitioner's 1994 and 1995 New York nonresident tax returns. On his 1994 and 1995 New York nonresident income tax returns, the petitioner reported as New York source income that portion of the petitioner's Cardozo salary attributable to the days he worked in Manhattan, teaching and meeting with students at the Cardozo Law School. The petitioner did not treat as New York source income that portion of the petitioner's Cardozo salary attributable to the greater number of days he worked at home in Connecticut, grading, researching and writing.

The respondent Commissioner of Taxation and Finance disagreed with this treatment and assessed New York nonresident income taxes on the petitioner's entire Cardozo salary including the portion of that salary attributable to the days the petitioner did his grading, research and writing at home in Connecticut and paid Connecticut income tax. For his disregard of the fact that the petitioner, as stipulated, actually performed his grading, research and writing activities in Connecticut, the Commissioner cited his "convenience of the employer" rule. An attempt to resolve this controversy through the Commissioner's conciliation process failed. The petitioner subsequently challenged the Commissioner's assessment of New York nonresident income tax against the portion of his Cardozo salary attributable to the days he worked at home in Connecticut and paid Connecticut income tax.

6. The Proceedings Below. In his challenge to the Commissioner's assessment, the petitioner noted that the "convenience of the employer" rule double taxed the petitioner on the portion of his Cardozo salary properly apportionable to the days he worked at home in Connecticut and paid Connecticut income tax on that salary. On the facts of this case, the petitioner alleged, the "convenience of the employer" rule and the double taxation it caused violated the Commerce and Due Process Clauses as interpreted by this Court. The parties have stipulated that "[t]he sole issue for decision is the constitutionality of the employer convenience doctrine on the facts of this case." App. 84.

In the first proceeding below, Administrative Law Judge Dennis M. Galliher rejected the petitioner's constitutional claims, App. 69-80, concluding that the "petitioner pays a price for choosing to work at home," i.e., double taxation of his salary attributable to those days. App. 80. The Tax Appeals Tribunal affirmed, rejecting the petitioner's Due Process and Commerce Clause arguments. App. 40-44. The Supreme Court of New York, Appellate Division, Third Department, then affirmed the Tax Appeals Tribunal.

The Appellate Division admitted that "upon the stipulated facts" of the case "a portion of petitioner's income [is] being taxed both in New York and Connecticut." App. 18. The Appellate Division further conceded that the "convenience of the employer" rule "has been the focus of criticism." App. 21.

Nevertheless, the Appellate Division upheld the rule and the double taxation it caused, rejecting the petitioner's Due Process and Commerce Clause claims. App. 20-21.

Finally, the New York Court of Appeals affirmed, declaring that New York's double taxation of the petitioner's income on the days he worked at his Connecticut home violates neither the Commerce Clause nor the Due Process Clause. App. 9-13.

The decision below, sustaining New York's "convenience of the employer" rule, systematically inflicts double taxation on thousands of nonresident telecommuters who have no effective remedy against this unconstitutional rule unless such a remedy comes from this Court.

REASONS FOR GRANTING THE WRIT

I) The decision below upholds New York's "convenience of the employer" rule and the double taxation of nonresident telecommuters like the petitioner for working at home. In doing so, the decision below disregards the Commerce Clause and Due Process case law of this Court and the principles that case law establishes.

A. The Commerce Clause and Due Process decisions of this Court require the States to minimize the risk of multiple taxation. Specifically, those decisions require the States to avoid extraterritorial taxation and to tax nonresidents only on income properly apportionable to the taxing State based on the actual activity conducted in that State.

To avoid the risk of multiple taxation by different States, the Commerce Clause, as long interpreted by this Court, requires that each State's income tax be fairly

apportioned based on the actual activity occurring in that State. Such apportionment is one of the four elements of the now-celebrated *Complete Auto* test. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (State tax survives "Commerce Clause challenge when the tax . . . is fairly apportioned"). *See also Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948) (New York's gross receipts tax must be "fairly apportioned" on the basis of the physical mileage traveled by interstate buses in each State).

The constitutionally-required apportionment of income must "reflect the location of the various interstate activities by which [the income is] earned." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995). When, for example, a bus travels between points in New York using out-of-state roads for part of the trip, New York, to avoid the risk of multiple taxation, can levy its gross receipts tax only as to the income attributable to the mileage traveled in New York. In such a case, New York cannot tax the remainder of the income properly apportioned to the bus's out-of-state mileage. *Central Greyhound*, 334 U.S. at 663.

A credit for taxes paid in other States is a permissible means of apportioning tax liabilities to avoid the risk of multiple taxation. *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989) ("To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation.")

As interstate travel constitutes interstate commerce, nonresident income taxes imposed on interstate commuters must meet the strictures of the dormant Commerce

Clause including its fair apportionment requirement. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997) ("[T]he transportation of persons across state lines . . . has long been recognized as a form of 'commerce.'")

A State violates its constitutional obligations when it creates the risk of multiple taxation. If a State fails to properly apportion the income of nonresidents, it matters not whether another State actually levies a second income tax. It is the creation of the risk which violates constitutional norms against multiple taxation. *See, e.g., Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 314 (1998) ("Nor, we may add, can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State") (internal citation omitted).[5] *See also Central Greyhound*, 334 U.S. at 663 ("[E]ven if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transportation, such abstention would not justify the taxing by New York of the entire revenue.")

Independently and simultaneously, the Due Process Clause prevents a State from projecting its taxing authority extraterritorially. *See, e.g., Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 777, 782 (1992) ("The principle that a State may not tax value earned outside its borders rests on the fundamental requirement

[5] *Lunding* was another case in which New York systematically and unconstitutionally taxed nonresidents and was only stopped because of the intervention of this Court.

of both the Due Process and Commerce Clauses . . . ") (States may not "tax extraterritorial values").

An individual's State of residence has plenary authority to tax his income on a worldwide basis. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-463 (1995). In contrast, a State may tax a nonresident only on income arising from sources within that State. *Id.* at 463, n.11. In defining the income sourced to the nonresident State, that State must comply with both the Commerce Clause fair apportionment test and the Due Process prohibition on extraterritorial taxation and thus must refrain from taxing income properly assigned to other States by virtue of the activity occurring in those other States.

B. In this case, New York violated these well-established constitutional principles. In particular, New York disregarded the petitioner's actual activity at home in Connecticut. New York instead taxed all of the petitioner's salary, including the salary the petitioner earned at home in Connecticut.

In this typical telecommuting case, New York's "convenience of the employer" rule double taxed the petitioner for working at home. Such double taxation violated both the Commerce Clause requirement of fair apportionment and the Due Process prohibition on extraterritorial taxation.

As the courts below recognized, see App. 11, 18, in this case, double taxation has occurred as Connecticut and New York both taxed the portion of the petitioner's

Cardozo salary attributable to the days he worked at home in Connecticut. Neither State provided a credit for the taxes assessed by the other for the days the petitioner worked at home in Connecticut.[6] The resulting double taxation of an interstate telecommuter produced precisely the result proscribed by the Commerce Clause and its fair apportionment principle, i.e., multiple taxation of the same income by different States.

In this case, double taxation stemmed from New York's refusal to apply its apportionment formula[7] on the ground that the petitioner, an interstate telecommuter, worked at home in Connecticut for his personal convenience, rather than for his employer's necessity. New York also failed to pursue its other option in this situation for compliance with the Commerce Clause fair apportionment rule, a credit against New York tax for the tax the petitioner paid to Connecticut for the days the petitioner worked at home. *See Goldberg*, 488 U.S. at 264.

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[6] *See* Gavin and Pavano, *supra*, note 4. Connecticut taxed the petitioner on the basis of his status as a Connecticut resident. On the days when the petitioner worked at home, Connecticut was also the State of source, i.e., the State, per *Central Greyhound* and *Jefferson Lines*, in which the petitioner's income-producing activity (writing, research and grading) actually occurred. Nevertheless, under the employer convenience rule, New York taxed the petitioner's Cardozo salary allocable to his days worked in Connecticut on the ground that the petitioner worked at home for his (rather than for his employer's) convenience.

[7] That formula appears at 20 N.Y.C.R.R. Section 132.18(a) and apportions nonresidents' incomes between New York and other States based on the days worked within and without New York. See App. 85-87.

New York's "convenience of the employer" rule would violate New York's Commerce Clause obligation to apportion even if Connecticut had no income tax of its own or if Connecticut elected to grant a credit for taxes paid to New York by Connecticut residents under the employer convenience rule. As this Court has emphasized, a State violates its constitutional obligations when it creates the risk of multiple taxation. If New York taxes the income of nonresidents in an unapportioned and extraterritorial manner, it matters not whether Connecticut actually levies a second income tax. It is the creation of the risk which violates constitutional norms against multiple taxation. *See, e.g., Lunding*, 522 U.S. at 314; *Central Greyhound*, 334 U.S. at 663. And the essence of New York's "convenience of the employer" rule is New York's methodical refusal to apportion income on days when nonresidents, for their own convenience, work at home outside New York's borders. *See* 20 N.Y.C.R.R. Section 132.18(a), App. 85-87.[8]

In Due Process terms, it is difficult to conceive of a more classic extraterritorial projection of taxing authority than New York's deliberate taxation of income attributable to the writing, research and grading the petitioner undertook at home in Connecticut. Through the employer convenience rule, New York knowingly reached into the

[8] In theory, the respondent Commissioner can invoke his employer convenience rule to double tax any income earned outside New York when a nonresident employee works out-of-state for his, rather than his employer's, convenience. In practice, as all the cases and commentary indicate, the Commissioner deploys the employer convenience rule to double tax nonresidents who work at their out-of-state homes.

petitioner's out-of-state home through the fiction that his days spent in Connecticut (a majority of the petitioner's working days) were really days spent in Manhattan.

In short, New York has refused to apportion the petitioner's professorial salary between itself and Connecticut based on the petitioner's activity in each State. Instead, New York has, via the employer convenience rule, taxed all of that salary in violation of both the Commerce Clause and the Due Process Clause. New York has thereby double taxed part of the petitioner's salary.

New York has, under the employer convenience rule, effectively taxed the petitioner as if he were a New York resident, subject to New York taxation on his income earned outside New York. However, the petitioner is not a New York resident and, as a constitutional matter, cannot be taxed as if he were one. The petitioner, as a nonresident, can only be taxed by New York on his New York source income attributable to his actual activity in that State. *See Chickasaw Nation*, 515 U.S. at 462-463.

Given the conflict between New York's "convenience of the employer" rule and the Commerce and Due Process principles articulated in the case law of this Court, it is unsurprising that, as the Appellate Division admitted, the rule has "been the focus of criticism" for the pervasive double taxation the rule causes. App. 21. Indeed, prominent commentators have widely condemned the employer convenience rule (including its application in this case) as unfair, irrational and unconstitutional. *See, e.g.*, Jerome R. Hellerstein and Walter Hellerstein, 2 *State Taxation* (2003

Supp.), para. 20.05[4][e][i] (the decision of the Appellate Division in this case "does not withstand analysis.")[9]

See also, Peter L. Faber,[10] "New York's 'Convenience of Employer' Doctrine Extended in Unterweiser," 29 *State Tax Notes* 707, 709 (September 8, 2003) ("The reason why the work is done outside the state, and whether it is done outside the state for convenience, necessity, or some other reason, should be constitutionally irrelevant.")

II) The decision below conflicts with the decisions of other State courts interpreting and applying the case law of this Court to avoid the risk of multiple taxation under the Commerce and Due Process Clauses. Most notably, the decision below conflicts with the decision of the Pennsylvania Supreme Court in *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia.*

By its decision below, the New York Court of Appeals has placed itself in conflict, not just with the decisions of this Court, but with the opinions of the courts of other States which have adhered to the Commerce Clause and Due Process case law of this Court. Most notably, the

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[9] Professor Walter Hellerstein is the leading commentator on state and local taxation. His treatise has frequently been cited by this Court. *See, e.g., Chickasaw Nation*, 515 U.S. at 463 (citing Hellerstein treatise); *Jefferson Lines*, 514 U.S. at 180, 194 (citing Hellerstein treatise).

[10] Mr. Faber is former chair of the Tax Section of the American Bar Association. He is also the author of the brief filed below in support of the petitioner by the Partnership for New York City, the successor organization to the New York Chamber of Commerce.

decision below conflicts with the decision of the Pennsylvania Supreme Court in *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 573 Pa. 189, 823 A.2d 108 (2003), a decision which affirms that, to avoid the risk of multiple taxation, each State must apportion income based on the activity actually occurring in that State.

The facts in *Philadelphia Eagles* are akin to the facts of this case: Just as the petitioner worked within and without New York, the Eagles played home games in Philadelphia and played the rest of their games out-of-town. Just as the Cardozo Law School stood in New York on the days the petitioner worked at home in Connecticut, the Eagles' stadium stood in Philadelphia on away game days.[11]

Just as New York seeks to tax the petitioner's entire Cardozo salary, Philadelphia assessed tax against all of the Eagles' "media receipts" from the broadcast of games, whether such games were played at home in Philadelphia or out-of-state. Such taxation of the entire media receipts, the Pennsylvania Supreme Court held, violated the Commerce Clause test for fair apportionment as articulated by this Court, a test based on the actual activity in each State:

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[11] Yet another similarity between this case and *Philadelphia Eagles* is that, in both instances, amicus briefs were filed in support of the taxpayer by the local Chamber of Commerce. *See Philadelphia Eagles*, 573 Pa. at 228, n.41; 823 A.2d at 133, n.41. The New York organization is today known as the Partnership for New York City. In *Philadelphia Eagles*, the amicus was the Pennsylvania Chamber of Business and Industry.

> [B]y reaching beyond its borders and taxing receipts from the Football Club's business activities in other jurisdictions, the City clearly put the Football Club at risk of being subjected to multiple taxation.

Id., 573 Pa. at 228, 823 A.2d at 132-133.

It is instructive to compare the fashion in which the Pennsylvania court applied the relevant cases of this Court – *Complete Auto, Central Greyhound, Goldberg, Jefferson Lines* – with the treatment of those Commerce Clause decisions by the New York Court of Appeals. Reading those decisions, the Pennsylvania court declared that Philadelphia, by taxing media receipts for games both within and without Philadelphia, taxed in an "inherently arbitrary" fashion which "had no rational relationship to the Football Club's business activity that occurred *in Philadelphia*." *Id.*, 573 Pa. at 227, 823 A.2d at 132 (italics in original). According to the Pennsylvania court, such "inherently arbitrary" taxation violated the Commerce Clause apportionment rule based on the activity actually performed in the taxing State. For the Pennsylvania court, the crux of Philadelphia's Commerce Clause obligation was to apportion income based on "where the football games were played and broadcast from." *Id.*, 573 Pa. at 229, 823 A.2d at 133.

In contrast to this emphasis upon the locations at which income-producing activity actually occurs, the Court of Appeals in the decision below held that the respondent Commissioner can tax all of the petitioner's salary including the petitioner's salary apportionable to his days worked at his out-of-state home, despite the double taxation thereby caused. To the Court of Appeals, the actual location of the petitioner's activity and the risk of double

taxation were irrelevant to the assessment of New York's nonresident income tax burden.[12]

Only this Court can resolve the conflict between the highest courts of two of the nation's largest States and can thereby confirm that the constitutionally proper rule is the holding of *Philadelphia Eagles* (to avoid the risk of multiple taxation, income must be apportioned among the States in accordance with the actual activity in each State) rather than the rule of the decision below (New York can disregard the stipulated locations at which the petitioner's activity occurred and can thereby systematically double tax income on the days that nonresident telecommuters like the petitioner work at their out-of-state homes).

Moreover, the conflict among the States' highest courts can only get worse. Pending before the Illinois Supreme Court is *Radinsky v. Zehnder*,[13] a case legally and factually similar to this case. Scott Radinsky was a resident of California and played for the Chicago White Sox in 1992. The Director of the Illinois Department of Revenue taxed Mr. Radinsky, a nonresident, in a manner similar to New York's "convenience of the employer" rule. In particular, Illinois attempted to tax all of Mr. Radinsky's income including the portion of his White Sox salary apportionable to his

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[12] *Philadelphia Eagles* was cited to the New York Court of Appeals, but was ignored by that court in the opinion below.

[13] *Radinsky* is pending before the Illinois Supreme Court as Case No. 95818. The opinion of the Illinois circuit court is reported unofficially in the Westlaw database and is discussed extensively by Professor Hellerstein. *See* Hellerstein and Hellerstein, *supra*, at para. 20.05[4][d]. *See also* Westlaw, Directory Location: All Databases>U.S.State Materials>Other U.S. States>Illinois>Tax Materials>Cases & Rulings (RIA-ILCAS)>"RIA SLT IL 96 L 51192".

out-of-state games. The Director's legal theory, analogous to New York's employer convenience rule as articulated in the decision below, is that Chicago was Mr. Radinsky's "base of operations."

On both Due Process and Commerce Clause grounds, the Illinois circuit court struck that State's attempt to tax the entirety of Mr. Radinsky's salary. Like the respondent Commissioner and the Court of Appeals in this case, the Illinois tax director justified a tax on Mr. Radinsky's entire salary by arguing that "Radinsky, although a nonresident, somehow receives more benefits from Illinois because his employer is based here." Looking to this Court's case law, the Illinois circuit court properly rejected this attempt to tax on an unapportioned basis income earned out-of-state and held that the constitutional touchstone for taxation is

> the activities of the nonresident taxpayer in the state rather than any purported benefits to be assessed due to the domicile of the taxpayer's employer in the state.

If the Illinois Supreme Court (as it should) affirms the lower court in *Radinsky*, it will thereby align itself with Pennsylvania's Supreme Court and its *Philadelphia Eagles* decision in contrast to the decision below. If the Illinois Supreme Court reverses, the tax commissioner of a second major State will receive a green light from his State's highest tribunal to pursue unapportioned, extra-territorial taxation of nonresidents. Either way, this Court should grant the writ of certiorari sought by the petitioner to provide clear and coherent guidance to the States' courts. If this Court does not provide such guidance, different States will continue to pursue their own (often conflicting) interpretations of the Commerce Clause and Due Process case law, leading to an increasingly complex,

chaotic and unfair situation as nonresident telecommuters are subject to systematic and unconstitutional double taxation for working at their out-of-state homes.

III) The decision below condones the systematic efforts of the respondent Commissioner to impose double taxation throughout the country on nonresident telecommuters who work at their out-of-state homes, often hundreds of miles from New York. New York plays a strategic role in the nation's economy with consequent visibility for New York's tax practices. The decision below, if left standing, will cause other States to emulate New York's aggressive double taxation of nonresident telecommuters on the days such telecommuters work at their out-of-state homes.

The decision below condones the efforts of the respondent Commissioner to impose double taxation throughout the country on nonresident telecommuters who work at their out-of-state homes, often hundreds of miles from New York.

Over the years, the States have developed a stable and well-coordinated framework implementing their respective constitutional obligations to avoid extraterritorial taxation and to apportion nonresident incomes per *Complete Auto, Central Greyhound* and *Jefferson Lines*. In particular, most States implement those obligations by taxing nonresidents' earned incomes in proportion to the days nonresidents actually work in each taxing State. *See* Hellerstein and Hellerstein, *supra*, at para. 20.05[4].

The opinion below destablizes this framework in two ways. First, the opinion below shifts the basis for nonresident income taxation from actual work performed in each taxing State to the employer's State of residence. Second, that opinion authorizes the State in which the nonresident's employer resides to tax on an unapportioned, extraterritorial basis the income attributable to the days when the nonresident works at home out-of-state.

At a minimum, the opinion below, if allowed to stand, risks double taxation for thousands of nonresident telecommuters who, like the petitioner, work during part or all of the week for New York employers at their out-of-state homes. Both amici below, the Attorney General of Connecticut and the Partnership for New York City (the successor to the New York City Chamber of Commerce), supported the petitioner because of their concerns about the widespread harm stemming from the Commissioner's double taxation of telecommuters, double taxation now condoned by the decision of the Court of Appeals.

The concerns of the Connecticut Attorney General and the Partnership are compelling. The respondent Commissioner has applied the legal fiction propounded by the "convenience of the employer" rule expansively to impose double taxation throughout the nation. As part of his aggressive application of the employer convenience fiction, the Commissioner has recently levied New York nonresident income taxes on individuals working at home in Tennessee and in Maine by pretending that they were working in New York. *In the Matter of the Petition of Thomas L. Huckaby*, App. 88-104 (New York Tax Appeals

Tribunal upholds New York nonresident income taxation for days worked at home in Nashville, Tennessee);[14] *In the Matter of the Petition of George A. P. and Joan H. Wallace*, App. 105-115 (Administrative law judge upholds New York nonresident income taxation for days worked at home in Portland, Maine).

In oral argument before the Court of Appeals, the respondent Commissioner confirmed his determination to continue his aggressive pursuit of double taxation of nonresident telecommuters for the days they work at their out-of-state homes. Specifically, the Commissioner's attorney characterized as "enormous" the revenue raised by the Commissioner under the employer convenience rule.[15] As the Connecticut Attorney General and the Partnership contend, the Commissioner, to raise these "enormous" revenues, is extracting unconstitutional double tax from thousands of nonresident telecommuters for the days they work at their out-of-state homes. As a practical matter, these nonresidents have no effective remedy for their constitutional rights since the New York courts, by the decision below, have made clear that they will continue to assess double tax under the employer convenience rule until this Court tells them otherwise.

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[14] It does not matter, as a constitutional issue, that Tennessee currently has no personal tax on earned incomes. Under this Court's decisions, New York violates its Commerce Clause obligation to apportion when it creates the risk of multiple taxation – whether or not the taxpayer's State of residence actually imposes a second tax. *See Lunding*, 522 U.S. at 314; *Central Greyhound*, 334 U.S. at 663.

[15] The October 15, 2003 oral argument before the Court of Appeals is available on VHS from the Government Law Center of Albany Law School.

The opinion below flashes a green light to the respondent Commissioner's nationwide double tax campaign[16] as telecommuting becomes more common.[17]

But the disruptive effect of the opinion below goes further: If New York can flout its constitutional obligations to apportion nonresidents' incomes and to avoid extraterritorial taxation, why should not other States emulate New York and also violate the traditional framework by double taxing nonresidents on the days they work at their out-of-state homes? Why, for example, should not California, on the basis of the opinion below, double tax

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[16] The respondent Commissioner frequently argues that he does not invoke the "convenience of the employer" rule to double tax a nonresident unless the nonresident himself has a New York office. There are two problems with this argument: It is untrue and it is irrelevant. The respondent Commissioner recently applied the "convenience of the employer" rule to tax the income of a New Jersey resident who worked at home and who no longer had a New York office. The respondent Tax Appeals Tribunal sustained this application of the employer convenience rule. *See* Faber, *supra* (discussing the decision of the New York Tax Appeals Tribunal *In the Matter of the Petition of Anita S. Unterweiser*).

Moreover, nothing in the logic of the opinion below limits the "convenience of the employer" rule to nonresidents with their own offices in New York nor is the rule, so limited, any less unconstitutional. The crux of the problem is New York's systematic refusal to follow the Commerce Clause and Due Process standards articulated by this Court, i.e., New York's insistence on taxing nonresidents on the days they work at their out-of-state homes by classifying such out-of-state days as days worked in New York.

[17] The legal literature on telecommuting is mushrooming as rapidly as is the practice itself. *See, e.g.,* Nicole Belson Goluboff, *The Law of Telecommuting* (with 2004 supplement); Note, "Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?" 81 *Minn. L. Rev.* 1309 (1997). *See also Allen, supra,* note 2.

the incomes of telecommuting nonresidents and thereby (in emulation of New York) raise "enormous" sums from telecommuters who work at their out-of-state homes for California-based employers?

New York plays a strategic role in the nation's economy with consequently high visibility for the tax policies New York pursues. If the decision of the Court of Appeals stands, other States will soon imitate New York by pursuing double taxation of nonresidents as aggressively as does New York. Unless this Court intervenes, the political temptation to impose unconstitutional double taxation on telecommuting nonresidents, i.e., nonvoters, will prove irresistible.

Moreover, once the traditional framework (nonresidents can only be income taxed for days actually worked in the taxing State) has been destablized by the opinion in this case (nonresidents' incomes can be double taxed on the days they work at their out-of-state homes), there is no reason to believe that the resulting problem will be limited to double taxation. Suppose that, in the tax environment shaped by the opinion below, an individual works at home in Colorado for a corporation with offices in both San Francisco and Manhattan. Both California and New York, under the logic of the opinion below, can tax the totality of this individual's salary since benefits are provided to the employer in both States. Per the decision below, this Colorado telecommuter's work at home is "inextricably intertwined" (App. 7) with both California and New York because the employer is located in both of the States. The result in this situation will be two unapportioned nonresident income taxes (California and New York) because, as the New York Court of Appeals tells us, it is this

individual's choice to live his lifestyle and the price of that choice is multiple taxation of the same income.

In sum, the opinion below conflicts, not just with the opinions of this Court and of other State courts, but also with the broader framework by which the States have (until now) implemented the principles articulated by this Court. Under that framework, the States have avoided double taxation of nonresidents' incomes by taxing only the share of nonresidents' incomes properly apportioned to actual in-state activity as measured by the days worked in the taxing State. Unless this Court reverses the decision below and thereby preserves the traditional framework, other states will emulate New York by systematically and unconstitutionally double taxing nonresident telecommuters on the days they work at home.

IV) The decision below conflicts with emerging national policy encouraging telecommuting. The "convenience of the employer" rule systematically double taxes thousands of nonresident telecommuters like the petitioner for days worked at their out-of-state homes. That rule and the double taxation it causes are singularly ill-suited to a modern, information-based economy which encourages individuals to use contemporary technology to work at home.

The rapid growth of telecommuting has been noted with increasing frequency in the decisions of the courts and in the legal literature. *See, e.g., Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding*, 514 U.S. 122, 129 (1995) ("if the Department of Transportation, to further a policy of encouraging so-called

'telecommuting' in order to reduce traffic congestion"). *See also Allen, supra*, note 2; Goluboff, *supra*, note 17; Note, *supra*, note 17.

The growth of telecommuting is hardly surprising. As modern forms of communication and research permit more employees to work at home for part or all of the work week, employees and employers have seized on the resulting possibilities both to accommodate employees' family needs and lifestyles and to increase productivity. Modern technology (such as Lexis, Westlaw, the Internet, email and fax machines) permits a law professor like the petitioner to undertake research at home. At the beginning of his career, this research would have required the petitioner's physical presence in the library. Moreover, the Federal, State and local governments have encouraged telecommuting to reduce traffic congestion and air pollution and to reduce strain on public infrastructure and services. *See, e.g.*, 40 U.S.C. Section 587 ("Telecommuting and other alternative workplace arrangements"); 42 U.S.C. Section 13438 ("Telecommuting study").[18]

Among the strongest governmental advocates of telecommuting is the respondent Commissioner. *See* Gerald B. Silverman, "New York State Tax Department Has Success With Telecommuting Program," *BNA Pension*

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[18] It is more than a little ironic that the decision below justifies New York's unapportioned, extraterritorial taxation of nonresident telecommuters on the basis of New York public services when other commentators on telecommuting indicate that telecommuters who work at their homes thereby reduce their consumption of public services. *See, e.g.*, "A Taxing Commute," *New York Sun*, October 15, 2003 at page 8 ("[T]elecommuters are taking up no space or resources. Mr. Zelinsky is one of these lightening the load on our infrastructure.")

& Benefits Daily (June 20, 2001) ("The New York State Department of Taxation and Finance, in an effort to improve productivity and retain employees by boosting morale, has implemented telecommuting programs at five regional offices.")

The decision below conflicts with the emerging national policy encouraging telecommuting by subjecting nonresident telecommuters to the risk (and frequently the reality) of double taxation on the days they work at their out-of-state homes. The Court of Appeals candidly defended its opinion in this case on the ground that New York's double taxation of nonresident commuters frustrates their out-of-state work at home by forcing such nonresident commuters to travel to New York to eliminate the double taxation of their incomes. *See* App. 10 (removing the double taxation of nonresidents who work at their out-of-state homes will "discourag[e] commuting into New York City . . . ")

In this vein, commentators have noted the conflict between the double taxation caused by New York's "convenience of the employer" rule and the emerging national policy encouraging telecommuting. *See, e.g.,* Gavin and Pavano, *supra,* note 4; Hellerstein and Hellerstein, *supra,* at para. 20.05[4][e].

Between the actions of the respondent Commissioner and the decision below, New York has effectively promulgated a policy which encourages intra-New York telecommuting, but which discourages interstate telecommuting via double taxation of income attributable to nonresidents' days worked at their out-of-state homes. This is a classic instance of the systematic state-based protectionism the Commerce Clause is intended to stop. *See, e.g., Camps*

Newfound/Owatonna, 520 U.S. at 575 (Commerce Clause is "barrier against protectionism").

The "convenience of the employer" rule methodically double taxes thousands of nonresident telecommuters like the petitioner who work at their out-of-state homes. The rule and the double taxation it causes are singularly ill-suited to a modern, information-based economy which encourages individuals to use contemporary technology to work at home – whether that double taxed telecommuter is a parent seeking to balance the demands of family and employment by working at home, a law professor with a working spouse and school age children, a disabled individual enabled to work more productively through telecommuting technology, or simply an individual seeking to utilize the flexibility of modern technology by working at home.

Given New York's prominence in the national economy and the likelihood that other States will emulate New York's tax policies, this Court should review the decision below in the context of the emerging national policy encouraging telecommuting and the threat to that policy from the widespread risk New York knowingly creates of double taxation for thousands of nonresident telecommuters on the days they work at their out-of-state homes.

CONCLUSION

For all of these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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State of New York

Court of Appeals

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3 No. 129

In the Matter of Edward A. Zelinsky et al.,

Appellants,

v.

Tax Appeals Tribunal of the State of New York et al.,

Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports

Edward A. Zelinsky, for appellants.

Julie S. Mereson, for respondents.

The Partnership for New York City; Richard Blumenthal, Attorney General of the Staet of Connecticut; City of New York, *amici curiae*.

KAYE, CHIEF JUDGE:

The taxpayer, a professor at Cardozo School of Law in New York City, contends that New York State may not constitutionally tax the entirety of his income because he performed some of his work at his home in Connecticut. We disagree and uphold the challenged tax.

I.

During the academic semesters in 1994 and 1995, petitioner-taxpayer commuted to New York three days each work week to teach his classes and meet with students. On the other two days, he stayed at home, where he prepared examinations, wrote student recommendations, and conducted scholarly research and writing. When school was not in session, and during his sabbatical leave

in the fall semester of 1995, he worked exclusively at home.

On the 1994 and 1995 New York State nonresident income tax returns filed jointly by the taxpayer and his wife,[1] he apportioned to New York the percentage of his total salary that reflected the number of days he commuted to the law school, allocating the remainder to Connecticut. The New York State Department of Taxation and Finance issued notices of deficiency for both years, maintaining that the entire law school salary was subject to taxation by New York. Applying the "convenience of the employer" test, the Department determined that the days that the taxpayer worked at his Connecticut residences should be counted as New York work days because he stayed at home for his own convenience and was not obligated by his employer to work outside New York. The portion of his salary that he allocated to the days he worked at home was also taxed by Connecticut, which did not provide a credit for the taxes assessed by New York.

Petitioner contested the deficiencies and also sought a refund for taxes paid on salary earned during his sabbatical leave, which he had forgotten to allocate to Connecticut. He claimed, as he does now, that application of the convenience of the employer test to him, resulting in New York's taxation of salary earned on the days he worked at home, violates the Commerce and Due Process Clauses of the Federal Constitution. An Administrative Law Judge rejected those constitutional challenges, as did the Tax

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[1] Because of the joint return, she too is named as a petitioner in this proceeding, but her income is not relevant to this appeal.

Appeals Tribunal. The taxpayer then commenced an article 78 proceeding in the Appellate Division, pursuant to Tax Law § 2016. The Appellate Division confirmed the administrative determination and dismissed the petition. We now affirm.

II.

Although a state may tax all the income of its residents, even income earned outside the taxing jurisdiction, it may constitutionally tax nonresidents only on their income derived from sources within the state (*see Shaffer v. Carter*, 252 US 37, 57 [1920]). In New York, the income of nonresidents is thus taxed by the State if it is "derived from or connected with New York sources" (*see* Tax Law §§ 601[e][1]; 631[a][1]).[2] New York source income includes income attributable to a business, trade, profession or occupation carried on in this State (*see* Tax Law § 631[b][1][B]). When a nonresident works partly in New York and partly in another state, the New York source income must be determined by apportionment and allocation according to regulations of the Commissioner of Taxation and Finance (*see* Tax Law § 631 [c]).

The Commissioner's regulations generally provide that if a nonresident employee performs services for an employer both within and without New York State, the portion of his or her income derived from New York sources, and thus apportioned and allocated to New York,

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[2] New York residents, by contrast, are taxed on their worldwide income (*see* Tax Law §§ 611[a], 612[a]; Internal Revenue Code [26 USC] §§ 61[a], 62[a])

consists of the ratio of total days worked in New York to total days worked both in and out of the State (*see* 20 NYCRR 132 .18[a]). Such apportionment and allocation, however, are limited by the convenience of the employer test, which states that "any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer" (20 NYCRR 132.18[a]).[3] Accordingly, nonresidents employed in New York who work at home when not required to do so by their employers must treat those days as if they had been present at their workstation in New York, resulting in New York source income. That is the proposition being tested by the present appeal.

III.

Although the dormant Commerce Clause limits the power of states to erect barriers against interstate trade, a challenged tax will generally satisfy constitutional requirements if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (*Complete Auto Tr., Inc. v. Brady,* 430 US 274, 279 [1977]).

Here, the taxpayer challenges only the second prong of this four-part test – that the tax be fairly apportioned – conceding that the remaining three criteria are met. The

[3] The "convenience of the employer" would therefore more aptly be called the "necessity of the employer" test.

central purposes of the fair apportionment requirement are "to ensure that each State taxes only its fair share of an interstate transaction" (*Goldberg v. Sweet,* 488 US 252, 260-261 [1989]) and to "minimize the likelihood that an interstate transaction will be improperly burdened by multiple taxation" (*Tennessee Gas Pipeline Co. v. Urbach,* 96 NY2d 124, 133 [2001]).

A tax is fairly apportioned if it is both internally and externally consistent. To be internally consistent, the tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result. Here, the taxpayer concedes that if Connecticut were to adopt the convenience of the employer test, he would not be subject to double taxation, because in that case Connecticut, after initially taxing the worldwide income of its resident, would provide a credit for the taxes paid to New York for the days he worked at home for his own convenience. His sole claim, therefore, is that the challenged tax is not externally consistent.

External consistency looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. * * * [T]he threat of real multiple taxation * * * may indicate a State's impermissible overreaching" (*Oklahoma Tax Commn. v. Jefferson Lines, Inc.,* 514 US 175, 185 [1995] [internal citations omitted]). External consistency is "essentially a practical inquiry" (*Goldberg,* 488 US at 264) for determining "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed" (*id.* at 262). No particular apportionment formula or method need be used to satisfy

constitutional requirements, "and when a State has chosen one, an objecting taxpayer has the burden to demonstrate 'by clear and cogent evidence' that 'the income attributed to the State is in fact out of all appropriate proportions to the business transacted * * * in that State, or has led to a grossly distorted result'" (*Jefferson Lines,* 514 US at 195, quoting *Moorman Mfg. Co. v. Bair,* 437 US 267, 274 [1978]).

IV.

In applying these principles, we need decide only whether the convenience of the employer test is constitutional as applied to the facts of this case.

The convenience test was originally adopted to prevent abuses arising from commuters who spent an hour working at home every Saturday and Sunday and then claimed that 2/7 of their work days were non-New York days and that 2/7 of their income was thus non-New York income, and either free of tax (if the state of their residence had no income tax) or subject to a lower rate than New York's.[4] In the present case, the taxpayer's efforts to reduce the amount of tax owed to New York on his New York source income earned during the work week raise similar concerns.[5]

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[4] Of course, in the absence of the convenience test, opportunities for fraud are great and administrative difficulties in verifying whether an employee has actually performed a full day's work while at home are readily apparent.

[5] We reject his claim that the convenience test no longer has any justifiable basis because Connecticut has since 1991 imposed an income

(Continued on following page)

We note at the outset that many busy professionals, at the conclusion of a full day, routinely bring work home for the evenings or weekends. Even when undertaken by an out-of-state commuter such as petitioner, this work cannot transform employment that takes place wholly within New York into an interstate business activity subject to the Commerce Clause. Cardozo Law School provides educational services to its students in New York City, which is where the taxpayer performs the primary duties of his occupation – teaching classes and meeting with students. The work he chooses to do at home is thus inextricably intertwined with the business of his New York law school, and cannot convert his employer's New York business into an interstate one when Cardozo did not employ him to carry out any of the school's business activities in Connecticut.

The taxpayer's reliance on *City of New York v. State of New York* (94 NY2d 577 [2000]) is therefore misplaced. In that case, we rejected the claim that a tax on out-of-state commuters did not implicate the Commerce Clause, explaining that the commute of tens of thousands of out-of-state residents "into New York City, on a daily basis, earning and spending part of their income in New York City, while paying the commuter tax" clearly impacted interstate commerce (94 NY2d at 597). The critical distinction

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tax. Insofar as the test "serves to protect the integrity of the apportionment scheme by including income as taxable" when the income results from services derived from New York sources but performed out-of-state "to effect a subterfuge" (*Matter of Colleary v. Tully,* 69 AD2d 922, 923 [3d Dept 1979]), the same incentive for tax avoidance exists when, as here, a neighboring state imposes tax at a lower rate than New York as when the state imposes no income tax at all.

between *City of New York* and the instant case, however, is that in *City of New York,* the tax at issue was imposed on the activity of commuting, not on the individual as a commuter. Here, the tax is imposed on income derived from the activity of teaching, not on the individual who is reading in his study in Connecticut.[6]

Nor can petitioner's circumstances be likened to the bus in *Central Greyhound Lines, Inc. v. Mealey* (334 US 653 [1948]), where the Supreme Court struck down an unapportioned gross receipts tax imposed on the sale of transportation services between points within New York because the bus traveled in large part over routes using out-of-state highways. In *Central Greyhound,* the risk of multiple taxation imposed by each of the various states through which the bus of necessity passed unfairly burdened interstate commerce, which was clearly impacted by the interstate travel of the bus. Here, by contrast, all of

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[6] The taxpayer also maintains that he is a "telecommuter" who, pursuant to *Matter of Allen v. Commr. of Labor* (100 NY2d 282 [2003]), may be taxed only according to the location in which he is physically present on any given day. *Allen,* however, involved neither taxes, nor the Commerce Clause, nor apportionment. Rather, in *Allen* we analyzed whether an employee physically present in Florida who "telecommuted" to New York by linking her laptop computer to her employer's Internet connection over telephone lines was "localized" in New York within the meaning of the Unemployment Insurance Law. In concluding that she was not, we emphasized that the relevant uniform statute contained a definition of "employment" that served in part to advance the purpose of allocating all the employment of an individual to one state and not to divide it "among the several States in which he might perform services" (*Matter of Mallia,* 299 NY 232, 238 [1949]; *see also* Labor Law § 511). Here, by contrast, the Commerce Clause requires that the tax be fairly apportioned among the various states from which one's income is derived.

petitioner's teaching is accomplished in New York and his voluntary choice to bring auxiliary work home to Connecticut cannot transform him into an interstate actor.

"The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such" (*General Motors Corp. v. Tracy,* 519 US 278, 300 [1997]). The taxpayer's crossing of state lines to do his work at home simply does not impact upon any interstate market in which residents and nonresidents compete so as to implicate the Commerce Clause. On these facts, the convenience of the employer test neither unfairly burdens interstate commerce nor discriminates against the free flow of goods in the marketplace. Nor does it result in differential treatment benefitting in-state interests at the expense of out-of-state interests. Rather, the convenience test serves merely to equalize tax obligations among residents and nonresidents, preventing nonresidents from manipulating their New York tax liability by choice of auxiliary work location in a manner unavailable to similarly situated New York resident employees. Since a New York resident would not be entitled to any special tax benefits for similar work performed at home, neither should a nonresident (*see Matter of Speno v. Gallman*, 35 NY2d 256, 259 [1974]).

Allowing this taxpayer to allocate his income to Connecticut when he stays home to do his work in connection with his teaching activity would enable him to avoid paying taxes that his colleagues who do that work at home in New York – or at the law school – pay. The Constitution does not require that a nonresident who does not opt for the personal convenience of taking work home rather than traveling into work every day be taxed at a higher effective tax rate than one who does. The State need not

subsidize such personal convenience, while at the same time discouraging commuting into New York City and facilitating erosion of the tax base.

Even presuming that petitioner's work at home sufficiently impacts upon interstate business activity as to implicate the Commerce Clause, because the entirety of the taxpayer's salary is derived from New York sources, New York's tax on his nonresident income is fairly apportioned. As a law professor, the taxpayer is primarily engaged in the business of teaching. It is for this that Cardozo hired him and for this that he is paid. It is thus readily apparent that he is not paid his salary in exchange for working five days per week, or three, or seven. Nor is he paid an hourly or daily wage. As long as his work is completed, he receives his full salary, whether he completes his work during the three days he comes to the office, or at home, or on the weekend. If he finishes all his work during the three days he commutes to the law school, and stays home without working on the other two days, he is paid no less. And if he ends up working five days a week in addition to every weekend, he is paid no more. From the perspective of his employer, as long as he performs his teaching responsibilities as scheduled, it matters not when or where he performs his ancillary functions.

The taxpayer is able to earn his salary – all of it – because of the benefits he receives every day from New York. He benefits directly from an employment opportunity and an office here. He benefits from a salary on every day that he works, which he is able to earn entirely within this State if he so chooses. As the Appellate Division noted, even his scholarly writings, drafted at home, attach prominence to his position as a professor at Cardozo Law School. New York thus provides a host of tangible and

intangible protections, benefits and values to the taxpayer and his employer, including police, fire and emergency health services, and public utilities. Petitioner's election to absent himself from the locus of his New York employment does not diminish what New York provides in order to enable him to earn that income. New York may require contributions from him because he thus "realiz[ed] current pecuniary benefits under the protection of the government" (*Shaffer v. Carter,* 252 US 37, 51 [1920]), and the tax imposed need not "bear an exact relation to the services actually provided to the individual taxpayer" (*Matter of Tamagni v. Tax Appeals Tribunal,* 91 NY2d 530, 544 [1998]).

Nevertheless, petitioner maintains that a constitutional violation is evident because his income has been taxed by two jurisdictions. But the mere potential for or actual existence of double taxation does not automatically transgress the Commerce Clause if, as here, the challenged tax is in fact fairly apportioned. For as the Tax Appeals Tribunal recognized, it was his own choice to allocate his income that created the threat of double taxation, not the convenience rule.

In *Tamagni,* we upheld the application of New York's resident income tax to statutory residents of this State who, as domiciliaries of New Jersey, were subject to resident income tax in New Jersey on certain income also taxed by New York. Since each tax was permissibly imposed under a different theory – New York validly taxed its statutory residents and New Jersey validly taxed its domiciliaries – the New York tax did not violate the Commerce Clause, even though its effect was double taxation. Similarly, in the instant case, New York has validly taxed the income of a nonresident derived from

New York sources, while Connecticut has, as it may, taxed the income of its resident.[7] "The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the accidental incident of interstate commerce being subject to two different taxing jurisdictions" (*Jefferson Lines,* 514 US at 192 [citations omitted]).

Since the New York tax is fairly apportioned, the resultant double taxation does not serve to invalidate the tax. For while a state may indeed constitutionally tax the worldwide income of its residents, it will typically provide a credit for income tax paid to another state – as New York does. Here, it is Connecticut's refusal to provide a credit to its resident for all of the nonresident income tax that the taxpayer paid to New York that has created the threat of double taxation. It is not, however, the "purpose of the Commerce Clause to protect state residents from their own state taxes" (*Goldberg*, 488 US at 266).

Since the New York tax imposed did not "reach[ ] beyond that portion of value * * * fairly attributable to economic activity within the taxing State" (*Jefferson Lines,* 514 US at 185), the taxpayer has failed to demonstrate by clear and cogent evidence that the income attributed to New York was in fact out of all appropriate proportion to the business transacted here or has led to a grossly distorted result (*see id.* at 195).

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[7] Connecticut may and does tax petitioner's income because he is its resident, not because two out of five of his work days were allegedly sourced in Connecticut.

V.

The Due Process Clause places two restrictions on a state's power to tax income generated by interstate activities. First, it "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (*Quill Corp. v. North Dakota,* 504 US 298, 306 [1992] [citation omitted]). Second, the "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State" (*Moorman,* 437 US at 273 [citation omitted]). A state, therefore, may not tax value earned outside its borders (*see e.g. Allied-Signal, Inc. v. Director, Div. of Taxation,* 504 US 768, 777 [1992]). Rather, the tax imposed must "bear[ ] fiscal relation" to "opportunities which [the state] * * * has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. * * * The simple but controlling question is whether the state has given anything for which it can ask return" (*Wisconsin v. J.C. Penney Co.,* 311 US 435, 444 [1940]).

Here, petitioner – both because of his physical presence in New York and because he has "purposefully avail[ed] [him]self of the benefits of an economic market in the forum State" (*Quill,* 504 US at 307) – clearly has a "minimum connection" to New York by virtue of his employment at Cardozo School of Law. Moreover, based on the same protections, opportunities and benefits conferred on him by New York as to satisfy the Commerce Clause, the convenience of the employer test as applied here does not tax "extraterritorial values" (*Container Corp. of Am. v. Franchise Tax Bd.,* 463 US 159, 164 [1983]). Rather, as the Appellate Division recognized, an ample foundation to justify the tax is provided by the host of tangible and

intangible benefits flowing directly and indirectly to petitioner from New York, the location of the law school that supplies his total relevant income.

Accordingly, the judgment of the Appellate Division should be affirmed, with costs.

* * *

Judgment affirmed, with costs. Opinion by Chief Judge Kaye. Judges Smith, Ciparick, Rosenblatt, Graffeo and Read concur.

Decided November 24, 2003

State of New York Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 5, 2002 91216

In the Matter of
EDWARD A. ZELINSKY et al.,

Petitioners,

v

TAX APPEALS TRIBUNAL OF
THE STATE OF NEW YORK et al.,

Respondents.

OPINION AND
JUDGMENT

Calendar Date: October 9, 2002

Before: Mercure, J.P., Crew III, Spain, Rose and Lahtinen, JJ.

Edward A. Zelinsky and Doris Zelinsky, New Haven, Connecticut, petitioners pro se.

Eliot Spitzer, Attorney General, Albany (Andrew D. Bing of counsel), for Commissioner of Taxation and Finance, respondent.

Jonathan L. Ensign, Office of Connecticut Attorney General, Hartford, Connecticut, for Commissioner of the Connecticut Department of Revenue Services, amicus curiae.

Lahtinen, J.

Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to review a

determination of respondent Tax Appeals Tribunal which sustained a personal income tax assessment imposed under Tax Law article 22.

The issue before the Court is whether the Department of Taxation and Finance (hereinafter Department) violated the Commerce Clause or the Due Process Clause of the Federal Constitution when they allocated all of the income of a nonresident, petitioner Edward A. Zelinsky (hereinafter petitioner), to New York under the so-called "convenience of the employer" test. The stipulated facts provide in relevant part that, during 1994 and 1995, petitioner was a resident of Connecticut and was employed as a professor of law at Cardozo Law School in New York City. His duties included teaching classes, meeting with students, preparing and grading examinations, writing recommendations for students and conducting scholarly research and writing. During the 28 weeks constituting the two academic semesters in 1994, petitioner spent three days each work week in New York City teaching classes and meeting with students. He remained in Connecticut two days each work week performing the balance of his duties. When classes were not in session, petitioner worked exclusively in Connecticut. His work was similarly split between New York and Connecticut in 1995, except that he spent less time in New York because he was on sabbatical leave during the fall semester of 1995.

On the 1994 and 1995 New York nonresident income tax returns filed by petitioner and his wife, petitioner apportioned to New York the percentage of his total salary that reflected the days he was actually present at Cardozo Law School in New York. The Department issued notices of deficiency for both years, maintaining that petitioner's entire salary from Cardozo Law School was subject to

taxation by New York. The deficiencies were sustained following a conciliation conference. At a hearing before an Administrative Law Judge (hereinafter ALJ), petitioners advanced a federal constitutional challenge to the convenience of the employer test, which the Department had relied upon to tax all his income from Cardozo Law School. Petitioners' constitutional challenge was rejected by the ALJ and, thereafter, respondent Tax Appeals Tribunal affirmed the ALJ. This proceeding ensued.

The income of nonresidents is taxed by New York if it is "derived from or connected with New York sources" (Tax Law § 631[a][1]). Nonresidents are permitted to apportion their income for work conducted outside New York as provided in the regulations of the tax commission (*see* Tax Law § 631[c]). The relevant regulation limits apportionment and allocation pursuant to the "convenience of the employer" test, which states in part that "any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer" (20 NYCRR 132.18[a]). The Court of Appeals has stated that "[t]he policy justification for the 'convenience of the employer' test lies in the fact that since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services or maintains an office in New York State" (*Matter of Speno v Gallman,* 35 NY2d 256, 259; *see Matter of Kitman v State Tax Commn.,* 92 AD2d 1018, 1019 *lv. denied* 59 NY2d 603). A previous challenge to the convenience of the employer test on the grounds that it violated the Commerce Clause and Due Process Clause

was rejected by this Court in *Matter of Colleary v Tully,* (69 AD2d 922).

Petitioners contend that *Colleary* failed to directly address the arguments raised herein and, further, that decisions subsequent to *Colleary* by the U.S. Supreme Court and the New York Court of Appeals point to a conclusion contrary to the holding in that case. The Commerce Clause, which contains an affirmative grant of regulatory power to Congress, has been consistently construed to also include a "negative" or "dormant" aspect that prohibits states from interfering with interstate commerce (*see Camps Newfound/Owatonna v Town of Harrison,* 520 US 564, 571-572; *Quill Corp. v North Dakota,* 504 US 298, 309; *City of New York v State of New York,* 94 NY2d 577, 596). The tax in dispute, while facially neutral regarding interstate commerce, has the effect, based upon the stipulated facts, of resulting in a portion of petitioner's income being taxed both in New York and Connecticut. However, the fact that Connecticut may tax a portion of the same income as New York, causing additional taxation from the combined effect of the laws of the two states, does not necessarily lead to the conclusion that the New York tax violates the Commerce Clause (*see Moorman Mfg. Co. v Bair,* 437 US 267, 277, n 12; *Curry v McCanless,* 307 US 357, 368 ["there are many circumstances in which more than one state may have jurisdiction to impose a tax"]).

A state tax survives a Commerce Clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (*Complete Auto Tr. v Brady,* 430 US 274, 279; *see Quill Corp. v North*

Dakota, supra at 310-311). Petitioners' constitutional challenge is limited to the fair apportionment prong of the four-part test set forth in *Complete Auto Tr. v Brady, supra*. The fair apportionment element is analyzed for internal and external consistency (*see Oklahoma Tax Commn. v Jefferson Lines,* 514 US 175, 185; *Goldberg v Sweet,* 488 US 252, 261). Petitioners concede internal consistency and, thus, their Commerce Clause argument distills to whether the convenience of the employer test is externally consistent.

Unlike the internal consistency test, external consistency "looks not to the logical consequences of cloning [the taxing statute to all other states], but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State" (*Oklahoma Tax Commn. v Jefferson Lines, supra* at 185). It is "essentially a practical inquiry" in which factors such as "administrative and technological barriers" are relevant (*Goldberg v Sweet, supra* at 264-265). The U.S. Supreme Court has stated, regarding the external consistency aspect of the fair apportionment element, that "[w]e have never required that any particular apportionment formula or method be used, and when a State has chosen one, an objecting taxpayer has the burden to demonstrate by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted * * * in that State, or has led to a grossly distorted result" (*Oklahoma Tax Commn. v Jefferson Lines, supra* at 195 [internal quotation marks omitted]).

The Department's economic justification in taxing petitioner's income begins with the fact that the entire

source of his disputed income is a law school located in New York (*cf. Oklahoma Tax Commn. v Chickasaw Nation,* 515 US 450, 463 n 11 ["as to nonresidents, 'the tax is only on such income as is derived from * * * sources (within the State)' "]). It is the existence of that law school – which receives the benefits and protections from New York every day of the year – that affords petitioner an employment opportunity and a salary. The work petitioner states he conducted in Connecticut was integrally intertwined with the law school. Even his scholarly writings attach prominence to his position as a professor of law at Cardozo Law School. When a New York employer who is the source of the income requires an employee to be in another state, New York permits a nonresident employee to apportion income. In that situation, the benefits and protections of the other state are necessarily implicated. However, where, as here, the decision to be in another jurisdiction is discretionary and the source of the income is entirely in New York, we are not convinced that New York's taxing scheme violates the Commerce Clause.

Central Greyhound Lines v Mealey (334 US 653), relied upon by petitioners, is distinguishable. Initially, we note that the value being taxed herein is not subject to easy apportionment as in *Central Greyhound.* In that case the value being taxed included highways which could be easily apportioned based upon miles traveled by a vehicle in the taxing state (*see generally Goldberg v Sweet,* 488 US 252, 264, *supra*). Here, New York provides a host of tangible and intangible protections, benefits and value to the source of petitioner's income – a law school located entirely in New York – and such attributes are not susceptible to easy apportionment. Moreover, the facts in *Central Greyhound* did not implicate the potential for abuse and

accompanying administrative difficulties that could flow from the position urged by petitioners (*see Matter of Phillips v New York State Dept. of Taxation & Fin.*, 267 AD2d 927, 928, *lv. denied* 94 NY2d 763; *Matter of Kitman v State Tax Commn.*, 92 AD2d 1018, 1019, *supra*). Accordingly, we find that petitioners have failed to demonstrate by clear and cogent evidence that the income attributed to New York is in fact out of all appropriate proportion to the business that petitioner transacted in New York (*see Oklahoma Tax Commn. v Jefferson Lines,* 514 US 175, 195, *supra*).

Petitioners' due process argument is equally unavailing. Under the Due Process Clause, a state may not arbitrarily tax value earned outside its borders (*see Allied-Signal v Director, Div. of Taxation,* 504 US 768, 777). To ensure that a tax satisfies due process, "'[t]he simple but controlling question is whether the state has given anything for which it can ask return'" (*Commonwealth Edison Co. v Montana,* 453 US 609, 625, quoting *Wisconsin v J.C. Penney Co.,* 311 US 435, 444). The tax imposed must "bear[ ] fiscal relation to protection, opportunities and benefits given by the state" (*Wisconsin v J.C. Penney Co., supra* at 444). An ample foundation to justify the tax under a due process analysis is provided by the host of tangible and intangible benefits flowing directly and indirectly to petitioner from New York, the location of the law school that supplies his total relevant income.

Finally, the Court is cognizant that New York's convenience of the employer test, which is utilized by only a few other states, has been the focus of criticism (*see e.g.* Lee, Lipari and Newman, *Odd Tax Laws Spell Trouble for Telecommuters and Employers,* 10 Journal of Multistate Taxation 37). In our view, however, since we find no

constitutional infirmity with the challenged tax scheme, the perceived problems must be addressed by Congress or the Legislature, not the courts.

Mercure, J.P., Crew III, Spain and Rose, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **EDWARD A. AND DORIS ZELINSKY** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22of the Tax Law and New York City Earnings Tax on Nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the Years 1994 and 1995.	DECISION DTA NO. 817065

Petitioners Edward A. and Doris Zelinsky, 1366 Grasso Boulevard, New Haven, Connecticut 06511, filed an exception to the determination of the Administrative Law Judge issued on November 2, 2000. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on May 23, 2001 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether application of the "convenience of the employer" test set forth in the regulations at 20 NYCRR 132.18(a) properly subjected petitioners' entire New York source income to taxation without any apportionment of such income between New York and Connecticut was violative of the Due Process Clause or the fair apportionment standard of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners,[1] Edward A. Zelinsky and Doris Zelinsky, are residents of the State of Connecticut. Edward A. Zelinsky is a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University in New York City. Doris Zelinsky is employed in Connecticut and has no New York source income.

In 1994 and 1995, Professor Zelinsky's duties involved preparing for and teaching classes, meeting with students, preparing and grading examinations, writing recommendations for students and conducting scholarly research and writing. During the years in question, 1994 and 1995, articles written by Professor Zelinsky appeared in the

[1] Since the issue in this proceeding centers on the proper tax treatment of income earned only by petitioner Edward A. Zelinsky, unless otherwise specified or required by context, references to "petitioner" or "petitioners" herein shall mean petitioner Edward A. Zelinsky.

Berkeley Journal of Employment and Labor Law, the Cornell Journal of Law and Policy, the Virginia Tax Review and Tax Notes.

In 1994, Professor Zelinsky worked in New York for 84 days. Specifically, for the 28 weeks constituting the two academic semesters of 1994, Professor Zelinsky commuted from Connecticut to the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each semester week in 1994, Professor Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations and conducting scholarly research and writing.

During the remaining weeks of 1994 before and after the academic semesters, Professor Zelinsky did not commute to New York City. During these nonsemester weeks of 1994, he worked exclusively in Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations and conducting scholarly research and writing.

In 1995, Professor Zelinsky worked in New York City for 42 days. Professor Zelinsky was on sabbatical leave during the fall semester of 1995. For the fourteen weeks of 1995 constituting the spring semester, Professor Zelinsky commuted from Connecticut to the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each spring semester week in 1995, Professor Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations and conducting scholarly research and writing.

During the remaining weeks of 1995 before and after the spring semester, Professor Zelinsky did not commute to New York City. During these nonteaching weeks of 1995 (including the fall of 1995 when he was on sabbatical leave), Professor Zelinsky worked exclusively in Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations, and conducting scholarly research and writing.

On the 1994 and 1995 New York nonresident income tax returns filed by the taxpayers, Professor Zelinsky apportioned his salary from the Cardozo Law School to New York on the basis of the days in each of these years he actually commuted to and was physically present in New York City. The notices of deficiency at issue herein disregard that apportionment and tax Professor Zelinsky on his entire salary from the Cardozo Law School, irrespective of the number of days Professor Zelinsky worked at home in Connecticut.

In this proceeding petitioners seek redetermination of an asserted deficiency for the year 1994, and redetermination of an asserted deficiency and a refund for the year 1995. The deficiencies at issue are asserted in notices of deficiency issued to petitioners by the Division of Taxation ("Division") dated March 16, 1998.

The taxes asserted in such notices of deficiency are New York State and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law. The taxes for which petitioners claim refund are also New York State

and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law. [2]

The amount of additional tax asserted by the Division for 1994 is $6,038.54, all of which petitioners contest. The amount of additional tax asserted by the Division for 1995 is $6,246.11, all of which petitioners contest. In addition, for 1995, petitioners request a refund of $2,719.00.

A conciliation conference in the Bureau of Conciliation and Mediation Services was requested and held as requested. A conciliation order, sustaining the deficiencies and rejecting the refund, was issued on March 26, 1999.

The deficiencies and the rejection of the Zelinskys' refund request are premised on the employer convenience doctrine. The parties agree that, if that doctrine can constitutionally be applied in this case, the deficiencies and the rejection of the refund are correct. The sole issue for decision is the constitutionality of the employer convenience doctrine on the facts of this case.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner's income from New York sources, i.e., his compensation from Benjamin N. Cardozo School of Law in New York City, was taxable pursuant to Tax Law § 631(a)

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[2] Although the stipulation of facts as well as some of the captioned correspondence in this matter refer to Tax Law Article 30, it appears the New York City portion of the tax deficiencies concern the New York City Earnings Tax on Nonresidents under Tax Law Article 30-B and Chapter 19, Title 11 of the Administrative Code of the City of New York.

and not subject to allocation pursuant to Tax Law § 631(c) and the regulations at 20 NYCRR 132.15 and 132.18. That portion of 20 NYCRR 132.18, allowing for an allocation of that portion of petitioner's income which was for compensation for services outside of New York State, which of necessity, as opposed to convenience, obligated the employee to perform out-of-state duties in the service of his employer, was the focus of the case presented to the Administrative Law Judge.

The Administrative Law Judge noted that where a nonresident individual is employed by a New York employer and performs his services both at the employer's New York locus and at his out-of-state home, where the services could have been performed at the employer's New York facility, such services are performed out-of-state for the employee's convenience and not the employer's necessity. As a result, the Administrative Law Judge determined that the New York source income was properly subject to New York tax.

This subjects income earned by petitioner while physically located and working outside of New York State to New York tax, and, in this case, where petitioner's state of residence was Connecticut, to Connecticut tax as well. This is so because Connecticut bases its tax on physical presence. The Administrative Law Judge noted that the tension created by these two taxing schemes and its resolution is the focus of this case.

The Administrative Law Judge noted that the validity of the convenience versus necessity test had been confirmed by the Court of Appeals in ***Matter of Speno v. Gallman*** (35 NY2d 256, 360 NYS2d 855) wherein the Court held that the justification for the rule is that since a

resident of New York would not be entitled to any special tax benefit for work done at home, neither should a nonresident who performs services or maintains an office in New York. Additionally, a constitutional challenge to the test was raised and rejected in ***Matter of Colleary v. Tully*** (69 AD2d 922, 415 NYS2d 266), where the petitioner argued that the rule violated the Due Process and Commerce Clauses. Finally, the Administrative Law Judge noted that the Appellate Division had endorsed a strict standard of employer necessity where the home is the workplace in question.

The Administrative Law Judge opined that the convenience of the employer rule was a limit on apportionment and a necessary refinement to prevent nonresidents working in New York from gaining a tax advantage over residents by choosing to work at home.

The Administrative Law Judge noted that petitioner, a Connecticut resident, is subject to tax on his salary allocated to those days worked at home in Connecticut with no credit for the tax levied by New York on the same income under the convenience rule. The issue for the Administrative Law Judge became whether the convenience rule is invalid where the tax benefit or differential between the resident and nonresident employee is magnified due to the nonresident state imposing a tax on the income, thus creating multiple taxation of the same income in violation of Due Process and Commerce Clause standards.

With regard to petitioner's due process argument, the Administrative Law Judge determined that the convenience rule did not deprive petitioner of his life, liberty or property without due process and that the tax imposed

because of the convenience rule bore a fiscal relation to the protections, opportunities and benefits given by the state. The Administrative Law Judge rejected petitioner's argument that his cross-border commute constituted interstate commerce with which New York's convenience rule unconstitutionally interfered. Petitioner argued to the Administrative Law Judge that the convenience rule represented excessive regulation on interstate commerce, specifically, that it did not allow for a fair apportionment of the tax. The Administrative Law Judge said that since petitioner was treated the same as any in-state counterpart, i.e., he was not subject to any additional tax in traveling to New York for his job, he received the benefits of the courts, the regulated labor market and benefits from fire, police and emergency services. The Administrative Law Judge noted that petitioner received the benefit of these services even on those days he chose to remain home. Therefore, the Administrative Law Judge reasoned that sourcing petitioner's income to New York on those days was attributable to his overall economic activities in New York.

With respect to the Commerce Clause issue, the Administrative Law Judge initially rejected petitioner's contention that he was engaged in interstate commerce, saying that there was no evidence of the same. The Administrative Law Judge noted that the fact that petitioner lived in one state and worked in another did not constitute interstate commerce, and the convenience rule did not impact an interstate market or burden the flow of goods in commerce. The key conclusion reached by the Administrative Law Judge was that even if the regulation had an impact on a nonresidents' choice of work location, it does not provide an advantage to residents employed by petitioner's

employer; rather, all employees are treated equally with respect to tax on their New York income.

The Administrative Law Judge rejected petitioner's reliance on ***Camps Newfound/Owatonna v. Town of Harrison*** (520 US 564, 137 L Ed 2d 852) for primarily the same reasons.

The Administrative Law Judge noted the decisions of both the Appellate Division and the Court of Appeals in ***Matter of Tamagni v. Tax Appeals Tribunal*** (230 AD2d 417, 659 NYS2d 515) and ***Matter of Tamagni v. Tax Appeals Tribunal*** (91 NY2d 530, 673 NYS2d 44, ***cert denied*** 525 US 931, 142 L Ed 2d 280) where it was explicitly stated that there was no Commerce Clause implication resulting from Mr. Tamagni's daily commute from New Jersey into New York where he worked as an investment banker.

The Administrative Law Judge observed that even if petitioner's circumstances were subject to Commerce Clause protection, the convenience rule could not be said to fail the constitutional test since it met the internal and external consistency tests. The Administrative Law Judge noted that there is a provision in Tax law § 620 which provides for a credit against ordinary tax for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction. Therefore, if the tables were turned and petitioner was a New York resident working in Connecticut, the same convenience of the employer rule would provide for a credit against any tax levied on the personal service income also taxed by Connecticut. Therefore, the rule is internally consistent. As mentioned above, the rule was found externally consistent because there was sufficient connection

between the income and New York and the amount of income taxed by New York is not out of all proportion to the ties to New York.

The Administrative Law Judge concluded that the apportionment and allocation rules are in symmetry and do not unfairly apportion to the advantage of a resident and the disadvantage of a nonresident. In succinct terms, the Administrative Law Judge identified the underlying tension in this matter:

> Simply because Connecticut does not, under its physical presence sourcing rules, recognize the income in question as New York source income, and instead taxes the same as Connecticut source income without credit for taxes paid to New York, does not serve to invalidate the regulation in issue as applied to petitioner . . . (Determination, conclusion of law "V").

ARGUMENTS ON EXCEPTION

Petitioner argues that the convenience of the employer rule applied to the facts of this case violates the Due Process Clause and the dormant Commerce Clause by taxing in New York salary properly apportioned to Connecticut for the days petitioner was physically present in Connecticut, working as an employee of his New York employer. Petitioner contends that the Supreme Court's decision in ***Central Greyhound Lines v. Mealey*** (334 US 653, 92 L Ed 1633) requires fair apportionment of nonresident income tax liability based on the taxpayer's in-state and out-of-state physical presence. Petitioner argues that the ***Speno*** and ***Colleary*** cases do not dispose of the constitutional issues raised by him in this matter. In addition, petitioner points out that the Division's own

regulations acknowledge an obligation to apportion income when an employee's out-of-state presence is required by his employer. He concludes that there is no constitutionally sound distinction between those days and days worked out-of-state for the employee's own convenience. Further, petitioner argues that neither the public services provided by New York nor the possibility of a tax-motivated decision justify the failure to apportion income.

Petitioner believes the application of the convenience rule to him causes double taxation in violation of the constitutional requirement that state taxes be externally consistent. Petitioner reasons that Connecticut has primary constitutional authority for taxing a resident on the days he works in Connecticut, being the state of residence and source of income.

Petitioner argues that the Administrative Law Judge misread the relevant case law on application of the Commerce Clause to his situation and ignored the economic disadvantage that the convenience rule inflicts on non-residents who work at home versus residents who work at home.

Finally, petitioner contends that ***Tennessee Gas Pipeline Co. v. Urbach*** (96 NY2d 124, 726 NYS2d 350) confirms his constitutional analysis. In ***Tennessee Gas***, the Court of Appeals declared unconstitutional New York's tax on gas importers since that tax resulted in double taxation and, thus, failed the fair apportionment test under the Commerce Clause. Whereas the petitioner in Tennessee Gas focused on the internal consistency test, petitioner focused on the external consistency portion of the fair apportionment test. The basis for this is that the Court in ***Tennessee Gas*** said that the import tax contained no

credit for taxes assessed on the purchase of the gas out-of-state and a double tax occurred, thereby creating an unconstitutional burden on interstate commerce. Petitioner maintains that New York's refusal to recognize the Connecticut tax burden causes double taxation and is not a permissible exercise of the State's taxing powers.

OPINION

Tax Law § 631(a)(1) provides that the New York adjusted gross income of a nonresident individual shall include, among other items, the sum of the net amount of items of income, gain, loss and deduction entering into his Federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. A nonresident individual's items of income, gain, loss and deduction derived from or connected with New York State sources are items, in part, attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[b][1]). The regulations promulgated pursuant to the statute provide as follows:

> The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State. . . . Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 132.16 through 132.18 of this Part (20 NYCRR 132.4[b]).

The pertinent regulation for purposes of this matter states:

> If a nonresident employee . . . performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction . . . of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. *However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer* . . . (20 NYCRR 132.18[a], emphasis added).

Unlike previous cases involving the convenience rule, petitioner makes no pretense that he is working at home for any other reason than his own convenience. His complaint is that he is being double taxed on the same income he earned from the Cardozo School of Law in New York City for the period in issue. The gravamen of his contention is that the convenience rule as applied to his situation violates the Due Process Clause and the dormant Commerce Clause of the United States Constitution by taxing his New York salary which should have been apportioned to Connecticut for those days when he was physically present there.

As noted by the Administrative Law Judge, New York does recognize the fair apportionment of income (***see***, Tax Law § 631 and the regulations at 20 NYCRR Part 132) but limits the apportionment and allocation of income out of New York with the convenience rule. Historically, the rule has been viewed as protecting "the integrity of the apportionment scheme by including income as taxable where it results from services substantially connected with New York but performed outside New York to effect a subterfuge" (***Matter of Colleary v. Tully***, ***supra***, 415 NYS2d, at 268). ***Colleary*** followed the seminal case of ***Matter of Speno v. Gallman*** (***supra***) where the Court of Appeals traced the history of the "place of performance doctrine," i.e., that personal services performed outside New York would not be taxable, from the Tax Law section providing for a tax on nonresidents on income from sources in the State to the refinement of this doctrine by the convenience rule. Presumably, the large number of commuters spurred the modification, which has been consistently applied by the New York courts. The ***Speno*** court stated the policy consideration for the rule was that since a New York resident would not be entitled to a tax benefit for work done at home, neither should a nonresident. Despite petitioner's protestations, we believe the prospect of a lower tax rate provides the same incentive for subterfuge that existed in 1974 when the ***Speno*** case was decided, albeit not as great a benefit as the one which existed then. Petitioner contends that we may not draw such an inference because the evidence does not indicate his New York or Connecticut tax brackets or a significant differential in the tax that might have been due. We are mindful of this failure of proof as well as the lack of any Connecticut tax returns or an employment agreement for the years in issue. However, this failure of

proof will not be construed most favorably for petitioner where he has the burden of proof (***Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992; 20 NYCRR 3000.15[d]). We take the strongest possible negative inference from petitioner's failure to present evidence that would demonstrate where and when petitioner discharged his duties for the law school (***see***, ***Noce v. Kaufman***, 2 NY2d 347, 161 NYS2d 1; ***Milio v. Railway Motor Trucking Co.***, 257 App Div 640, 15 NYS2d 73). We conclude that petitioner did not produce such evidence because it would not have contradicted the presumption that his services were performed in New York (***see***, ***Laffin v. Ryan***, 4 AD2d 21, 162 NYS2d 730).

The facts of this case indicate that petitioner was compensated for a set of duties which culminated in his provision of instruction to students at the Cardozo School of Law in New York City for three days a week during the two academic semesters in 1994 and the spring semester in 1995. The facts imply that the School of Law took no position on the locus of petitioner's ancillary job functions indirectly related to his instructional duties. There is no evidence such as an employment contract that would indicate that petitioner was compensated for his days at home. Although petitioner argues that he worked at home in Connecticut for a substantial number of days during each year, the evidence does not demonstrate that he was compensated for anything but his appearance at, and performance of duties in, New York City at the school as an instructor. Petitioner's interpretation of his job duties, the weight he attributed to each of them and the place of their performance was chosen by him for his personal gain and convenience. We find no justification for allocating any income from his Cardozo position to any other jurisdiction.

Petitioner's characterization did indeed create a situation where the potential for double taxation existed. But the evidence in this record does not support petitioner's claim. The finely parsed facts do not indicate what weight, if any, the law school placed on petitioner's ancillary duties or if they were aware of or condoned his activities.[3] We believe the school's position is critical because if his value to the school is his presence in the classroom as the facts and common sense indicate, then it is not unreasonable to conclude that his three days in New York comprise 100% of the basis for his salary and fully allocable to New York. The fact that petitioner chose to discharge ancillary functions in any jurisdiction other than New York is irrelevant to the school and to New York State. Allocation of the New York source income was not justified and should not have been made in a vacuum. Although he based his constitutional argument on the assumption that the convenience rule caused double taxation, it appears that the rule would have prevented it if heeded by petitioner. We believe it was just this type of arbitrary allocation the rule was meant to prohibit. This conclusion is strengthened by the fact that the policy consideration set forth in ***Speno*** is still present and petitioner's allocation allows him to enjoy a benefit not available to his New York counterparts.

Although we believe the analysis above disposes of this matter, we will address petitioner's constitutional

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[3] Although never raised as an issue herein, petitioner's brief makes mention of the potential impact of the convenience rule on "telecommuting," but any such allegation would have to be buttressed by the position of the employer in the form of proper and credible evidence.

arguments. Petitioner insists that his constitutional challenge is to the application of the convenience rule to his particular circumstances. Since petitioner alleges that the rule as applied to his special circumstances is the direct cause of double taxation "in reality," it is imperative that he establish that tax was paid to Connecticut. However, the sparse record is devoid of any documentation or credible testimony that this occurred. Neither the stipulation of facts nor the documentary submissions contain any credible evidence that this occurred. Since petitioner waived his right to a hearing, no credible sworn testimony is available. The double taxation is referred to in his legal arguments only, and we have cautioned that such unsworn statements will receive little weight and be treated as weak as hearsay evidence (***Matter of Café Europa***, Tax Appeals Tribunal, July 13, 1989). Therefore, petitioner has not established that a double taxation occurred in this matter, "in reality." Therefore, the "as applied" challenge must be interpreted as a facial challenge to the constitutionality of the convenience rule, i.e., whether the taxing schemes create the potential for or threat of double taxation.

In ***Matter of Brussel*** (***supra***), we stated that:

> [i]t is well established that the taxpayer has the burden to establish that a statute is unconstitutional on its face (***see***, ***Matter of Wiggins v. Town of Somers***, 4 NY2d 215, 173 NYS2d 579; ***Matter of Maresca v. Cuomo***, 64 NY2d 242, 485 NYS2d 724, ***appeal dismissed***, 474 US 802; ***Trump v. Chu***, 65 NY2d 20, 489 NYS2d 455, ***appeal dismissed***, 474 US 915).

We see petitioner's argument as a facial challenge to the Division's interpretation of Tax Law § 631(a)(1) as

embodied in 20 NYCRR 132.18(a). The Supreme Court has said that a state's apportionment taxing scheme must only tax a fair share of interstate transactions and that there is no one mandated method of taxation (***Goldberg v. Sweet***, 488 US 252, 102 L Ed 2d 607). The test is whether the tax is internally and externally consistent. Petitioner concedes that the convenience rule is internally consistent, i.e., if every state had the rule no multiple taxation would occur.[4] Petitioner's challenge rests squarely on the external consistency of the rule, i.e., whether New York has only taxed that portion of the nonresident income which reasonably reflects the in-state component of the activity being taxed (***Goldberg v. Sweet, supra***). It has been held that external consistency looks to "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State" (***Oklahoma Tax Commn. v. Jefferson Lines***, 514 US 175, 131 L Ed 2d 261, 272). Given our conclusion above, we believe that the nonresident tax imposed upon petitioner herein was proportionate to his business activities in the State since we determined that his salary was earned entirely in New York where he performed his job function. In addition, petitioner enjoys all the benefits of New York employment as his in-state peers including the protection of fire, police, emergency health services and public utilities.

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[4] In fact, two other states have very similar convenience rules: Pennsylvania (61 Penn Code § 109.8) and Nebraska (Nebraska Admin. Rules and Regs., Title 316, § 22-003[C][1]).

We recognize that the movement of persons across state lines is a form of commerce (***see***, ***Camps Newfound/Owatonna v. Town of Harrison, supra***). The question, however, is whether the convenience rule benefits in-state economic interests by burdening out-of-state interests, i.e., does it regulate evenhandedly with only incidental effects on interstate commerce, or discriminate against interstate commerce (***City of New York v. State***, 94 NY2d 577, 709 NYS2d 122 [wherein a commuter tax was found to be unconstitutional because it found "commuting" to be a taxable event and frankly discriminated against nonresidents]). We conclude that the convenience rule does treat residents and nonresidents evenhandedly in both purpose and effect. Failing a business reason for not appearing at the New York work location (employer's necessity) neither a resident nor a nonresident receives a benefit for days each chooses to allocate outside New York.

The convenience rule does not promote the interests of in-state employees over out-of-state employees – it merely puts them on an equal tax basis. It was petitioner's unilateral and completely voluntary allocation of his income that created a threat of double taxation, not the convenience rule. Petitioner was aware that by taking the position that his job was performed in Connecticut it was subject to Connecticut income tax (Regulations of Connecticut State Agencies 12-711[b]-4[a], [d]). He was also aware that Connecticut provides a credit against Connecticut income tax for income tax imposed by New York on income earned from services performed by a Connecticut resident in New York (Regs. of Conn. State Agencies 12-704[a]-4[a][3]) but that it does not provide a credit for New York tax on income generated from services performed in Connecticut, which is considered Connecticut source income. As the

Administrative Law Judge stated below, and in which we concur:

> [W]hile New York sources the nonresident's income to New York on days when he physically works outside of New York for his own convenience as opposed to some necessity, New York also consistently applies the convenience test in sourcing income for purposes of the New York credit afforded under Tax Law § 620 against the tax that New York residents pay to other jurisdictions upon income derived from sources in such other jurisdictions. Specifically, to qualify for the credit, the tax imposed by the other jurisdiction must be imposed on income "derived therefrom" (Tax Law § 620[a]). Under the implementing regulations, "the resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction" (20 NYCRR 120.1[a][2]; 120.4[d]). In fact, 20 NYCRR 120.4(d) provides, as a definition, that "*[i]ncome derived from sources within* another state . . . is construed so as to accord with the definition of the term *derived from or connected with New York State sources*, as set forth in Part 132 of this Title in relation to the adjusted gross income of a nonresident individual" (Determination, conclusion of law "R," emphasis as in original).
>
> Applying the foregoing to the situation reciprocal to petitioner's, i.e., where a New York resident is employed in Connecticut but chooses to work at home in New York on certain days, New

> York would include his employment income as New York income subject to tax (residents are generally subject to tax on income from all sources) but would also, consistently, source the income on the "choice to work at home" days as derived from Connecticut for purposes of allowing the credit against New York tax based on the tax due Connecticut on such income. Similarly, if Connecticut (or any other state) adopted a convenience test identical to the New York test, the Connecticut resident in petitioner's circumstances would have New York source income on the days worked by choice at home, with such income subject to New York tax. He would also pay Connecticut tax on such income as a resident (as does petitioner). However, he would also receive a resident credit against Connecticut resident income tax because Connecticut would recognize the New York sourcing of such income per the convenience test it had adopted, thus eliminating multiple taxation. Accordingly, if an identical convenience provision was adopted by Connecticut, no multiple taxation would result and, thus the convenience test does not fail the internal consistency requirement of fair apportionment. The problem is that Connecticut does not recognize and has not adopted the convenience test. This, however, is not a basis upon which to invalidate such test for New York purposes. In fact, if Connecticut were to adopt an identical convenience test regulation, the same would simply be viewed as reciprocal rather than retaliatory or discriminatory (Determination, conclusion of law "S").

In fact, it was Connecticut's taxing scheme which created the threat of double taxation. The New York convenience rule existed in regulations at least as early as

its inclusion in Manual 67 (1967) where language identical to the current 20 NYCRR 132.18 is found in 20 NYCRR former 131.16, some 24 years prior to the enactment of the Connecticut income tax in 1991. As stated above, the New York taxing scheme afforded a credit to residents that earned income in another state and paid income tax to both that state and New York. Although Connecticut certainly was aware of the convenience rule and the credit afforded by New York when it enacted its personal income tax in 1991, it did not provide its residents a credit for taxes paid to another jurisdiction, thereby setting the stage for the threat of double taxation. This is analogous to the situation which arose in ***Tennessee Gas Pipeline Co. v. Urbach*** (***supra***) where New York's import tax did not provide a credit for taxes paid on the purchase of gas which occurred out-of-state. This import tax fell before Commerce Clause scrutiny. However, the fact that Connecticut did not provide the credit to its residents does not transform the convenience rule into an unconstitutional reach across state lines to tax income earned as a result of services performed in that state. On the contrary, it was a permissible taxation of New York source income for which no basis for allocation was established. Despite petitioner's contentions, we see only incidental effect on interstate commerce and evenhanded treatment of in-state and out-of-state economic interests.

Petitioner's reliance on ***Central Greyhound Lines v. Mealey*** (***supra***) is misplaced. ***Central Greyhound*** dealt with New York's taxation of unapportioned receipts from transportation going through more than one state. As the Administrative Law Judge noted, there is simply no interstate interest or activity impacted by the regulation in issue; certainly not comparable to Maine's differential

tax treatment of camps serving primarily nonresident campers (***Camps Newfound/Owatonna v. Town of Harrison, supra***), or to nonresident commuters who were subjected to a tax on their commute to New York City (***City of New York v. State, supra***) or to common carriers whose vehicles traveled through New York and other jurisdictions but whose receipts New York taxed without apportionment (***Central Greyhound Lines v. Mealey, supra***).

The Due Process analysis requires that there be a definite link between the state and the person, property or transaction it seeks to tax (***Miller Brothers Co. v. Maryland***, 347 US 340, 98 L Ed 744). Given our analysis above, we believe there is a connection between New York and petitioner which repels any constitutional challenge based on the Due Process Clause of the Constitution.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Edward A. and Doris Zelinsky is denied;

2 The determination of the Administrative Law Judge is affirmed;

3. The petition of Edward A. and Doris Zelinsky is denied;

4. The notices of deficiency, dated March 16, 1998, are sustained; and

5. Petitioners' request for refund for the year 1995 is denied.

DATED: Troy, New York
November 21, 2001

/s/ Donald C. DeWitt
Donald C. DeWitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition of **EDWARD A. AND DORIS ZELINSKY** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Earnings Tax on Nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the Years 1994 and 1995.	DETERMINATION DTA NO. 817065

Petitioners, Edward A. and Doris Zelinsky, 1366 Ella Grasso Boulevard, New Haven, Connecticut 06511, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City earnings tax on nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the years 1994 and 1995.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 7, 1999 at 1:45 P.M., with all briefs to be submitted by May 2, 2000, which date commenced the six-month period for the issuance of this determination. Petitioner Edward A. Zelinsky, Esq., appeared *pro se* and on behalf of petitioner Doris Zelinsky. The Division of

Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether, by applying the "convenience of the employer test" embodied within 20 NYCRR 132.18(a), the Division of Taxation incorrectly subjected to New York taxation without apportionment all of the salary income paid by a certain New York employer to petitioner Edward A. Zelinsky, a nonresident, in contravention of the Due Process Clause or the fair apportionment standard of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT[1]

1. Petitioners, Edward A. Zelinsky and Doris Zelinsky, are residents of the State of Connecticut. Edward A. Zelinsky is a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University in New York City. Doris Zelinsky is employed in Connecticut and has no New York source income.

2. In 1994 and 1995, Professor Zelinsky's duties involved preparing for and teaching classes, meeting with students, preparing and grading examinations, writing

[1] The parties executed a Stipulation of Facts in connection with this proceeding. These stipulated facts are set forth as Findings of Fact herein. In addition, since the issue in this proceeding centers on the proper tax treatment of income earned only by petitioner Edward A. Zelinsky, unless otherwise specified or required by context, references to "petitioner" or "petitioners" herein shall mean petitioner Edward A. Zelinsky.

recommendations for students and conducting scholarly research and writing. During the years in question, 1994 and 1995, articles written by Professor Zelinsky appeared in the Berkeley Journal of Employment and Labor Law, the Cornell Journal of Law and Policy, the Virginia Tax Review and Tax Notes.

3. In 1994, Professor Zelinsky worked in New York for 84 days. Specifically, for the 28 weeks constituting the two academic semesters of 1994, Professor Zelinsky commuted from Connecticut to the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each semester week in 1994, Professor Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations and conducting scholarly research and writing.

4. During the remaining weeks of 1994 before and after the academic semesters, Professor Zelinsky did not commute to New York City. During these nonsemester weeks of 1994, he worked exclusively in Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations and conducting scholarly research and writing.

5. In 1995, Professor Zelinsky worked in New York City for 42 days. Professor Zelinsky was on sabbatical leave during the fall semester of 1995. For the fourteen weeks of 1995 constituting the spring semester, Professor Zelinsky commuted from Connecticut to the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each spring semester week in 1995, Professor

Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations and conducting scholarly research and writing.

6. During the remaining weeks of 1995 before and after the spring semester, Professor Zelinsky did not commute to New York City. During these nonteaching weeks of 1995 (including the fall of 1995 when he was on sabbatical leave), Professor Zelinsky worked exclusively in Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations, and conducting scholarly research and writing.

7. On the 1994 and 1995 New York nonresident income tax returns filed by the taxpayers, Professor Zelinsky apportioned his salary from the Cardozo Law School to New York on the basis of the days in each of these years he actually commuted to and was physically present in New York City. The notices of deficiency at issue herein disregard that apportionment and tax Professor Zelinsky on his entire salary from the Cardozo Law School, irrespective of the number of days Professor Zelinsky worked at home in Connecticut.

8. In this proceeding petitioners seek redetermination of an asserted deficiency for the year 1994, and redetermination of an asserted deficiency and a refund for the year 1995. The deficiencies at issue are asserted in notices of deficiency issued to petitioners by the Division of Taxation ("Division") dated March 16, 1998.

9. The taxes asserted in such notices of deficiency are New York State and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law. The taxes for which petitioners claim refund are also New York

State and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law.[2]

10. The amount of additional tax asserted by the Division for 1994 is $6,038.54, all of which petitioners contest. The amount of additional tax asserted by the Division for 1995 is $6,246.11, all of which petitioners contest. In addition, for 1995, petitioners request a refund of $2,719.00.

11. A conciliation conference in the Bureau of Conciliation and Mediation Services was requested and held as requested. A conciliation order, sustaining the deficiencies and rejecting the refund, was issued on March 26, 1999.

12. The deficiencies and the rejection of the Zelinskys' refund request are premised on the employer convenience doctrine. The parties agree that, if that doctrine can constitutionally be applied in this case, the deficiencies and the rejection of the refund are correct. The sole issue for decision is the constitutionality of the employer convenience doctrine on the facts of this case.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner, a nonresident who works for his New York employer Cardozo Law School both in New York

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[2] Although the stipulation of facts as well as some of the captioned correspondence in this matter refer to Tax Law Article 30, it appears the New York City portion of the tax deficiencies concern the New York City Earnings Tax on Nonresidents under Tax Law Article 30-B and Chapter 19, Title 11 of the Administrative Code of the City of New York.

and at home in Connecticut, argues that under Due Process and Commerce Clause standards, New York may impose tax only on the portion of his Cardozo Law School salary apportioned and allocated to New York based on the number of days he actually (i.e., physically) was present working in New York. He maintains that the balance of such salary is, by virtue of his physical presence in Connecticut on certain working days, properly apportioned and allocated to Connecticut as Connecticut source income and consequently may not be subjected to tax by New York. Petitioner does not seek a ruling that 20 NYCRR 132.18(a), known as the "convenience of the employer" test, is facially invalid. Rather, he seeks only a determination that such regulation is unconstitutional as applied to his set of circumstances.[3] Specifically, petitioner maintains

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[3] There is no challenge by the Division that petitioners are contesting the constitutionality of regulation 20 NYCRR 132.18(a) on its face, or that there is any jurisdictional impediment to addressing the validity of such regulation in this forum. In fact, there is specific statutory authority to address the validity of a regulation herein (Tax Law § 2006.[7]; ***Matter of Grieg***, Tax Appeals Tribunal, September 16, 1999). The Tax Appeals Tribunal has observed that a taxpayer bears the burden of proving that a statute, as applied, is unconstitutional. On this score, the Tribunal has held:

> [i]t is well established that the taxpayer has the burden to establish that a statute is unconstitutional on its face (***see, Matter of Wiggins v. Town of Somers***, 4 NY2d 215, 173 NYS2d 579; ***Matter of Maresca v. Cuomo***, 64 NY2d 242, 485 NYS2d 724, ***appeal dismissed*** 474 US 802; ***Matter of Trump v. Chu***, 65 NY2d 20, 489 NYS2d 555, ***appeal dismissed*** 474 US 915). We can see no reason why this rule does not apply with equal force when a taxpayer is challenging the constitutionality of a statute as applied. (***Matter of Ciccone***, Tax Appeals Tribunal, January 23, 1997).

(Continued on following page)

that Connecticut uses a physical presence approach to sourcing income and does not recognize the convenience of the employer test as a means of sourcing income. Accordingly, Connecticut treats the days he worked at home in Connecticut as resulting in Connecticut source income subject to tax by Connecticut, and allows no credit to offset the tax New York imposes on such income. Thus, petitioner points out that he is in fact subject to multiple taxation on the same income in violation of the constitutional requirement that income must be fairly apportioned in order to comport with Commerce Clause standards against unduly burdening interstate commerce. In the same vein, petitioner asserts that New York's convenience of the employer test also violates due process standards, in that income not sufficiently connected to New York is nonetheless, under such rule, subjected to taxation by New York. Finally, petitioner argues that the convenience test is essentially a throwback to the time when the states surrounding New York, including Connecticut, did not impose income taxes. On this score, petitioner posits that the convenience test is now clearly invalid under his circumstances given that the surrounding states, including his residence state of Connecticut, have enacted and imposed income taxes of their own, thus eliminating the possible tax benefit available to a nonresident of New York who simply chooses to work at home, and likewise eliminating any incentive to achieve such benefit via plan, abuse or subterfuge.

Similarly, then, it follows that the taxpayer challenging the constitutional validity of a regulation as applied bears the burden of establishing the claimed constitutional infirmity.

14. The Division argues, in contrast, that the convenience of the employer test has been upheld by the New York courts on numerous occasions and that the justification for such test, to wit, avoiding subterfuge and abuse so as to prevent a tax benefit from being available to a nonresident but not available to a resident taxpayer, remains valid. The Division posits that the income deemed New York source income via the convenience test is sufficiently connected to New York to meet with Due Process requirements, in that such income in question is generated by petitioner's New York employer based on petitioner's fulfillment of his employment responsibilities for such New York employer. Further, the Division argues that the Commerce Clause is not invoked under petitioner's circumstances, in that there is no identifiable market or flow of goods implicated or infringed upon by application of the rule with its resulting attribution of income to New York. The Division admits that the right to interstate travel is always protected by the Constitution, but maintains that such individual right to travel has nothing to do with commercial intercourse and thus this case does not implicate the Commerce Clause. The Division views the income in question as properly considered New York source income, and urges that the refusal of Connecticut to recognize the convenience test and accept the New York sourcing of the income, so as to either exclude the income from Connecticut taxable income or to provide petitioner with a credit for the tax paid to New York on such income, is a matter for petitioner to challenge in Connecticut. The Division maintains that this case comes down to sourcing and choice, noting that the relevant law and regulations allow for and require apportionment for out-of-state work performed by a nonresident where that nonresident employee is obligated to perform such work out of state.

The Division states that the convenience test simply serves the purpose of protecting the integrity of apportionment against abuse or subterfuge when the issue of work location is a matter of choice and there is the possibility of a resulting tax benefit to a nonresident not available to a resident. The Division also points out that, unlike Connecticut, New York affords its residents a credit under Tax Law § 620 and 20 NYCRR 120 for taxes paid to other jurisdictions based on income derived therefrom which is also subject to tax by New York, and thus protects its residents under circumstances of this kind.

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident individual (such as petitioner Edward A. Zelinsky) includes the net amount of items of income, gain, loss and deduction reported in Federal adjusted gross income that are "derived from or connected with New York sources." Included among these items are those attributable to a business, trade, profession or occupation carried on in this State (Tax Law §631[b][B]).

B. Tax Law 631(c) provides, in part, that:

> [i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

C. Regulations of the Commissioner of Taxation pertaining to business activities carried on in New York State provide as follows:

> The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State. . . . Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 131.16 through 131.18 of this Part (20 NYCRR 131.4[b]).

D. Regulations pertaining to and explaining the "Methods of Allocating Income and Deductions From Sources Within and Without New York State," as in effect during the years in question, provided as follows:

> § 132.15 *Apportionment and allocation of income from business carried on partly within and partly without New York State.*
>
> (a) If a nonresident individual . . . carries on a business, trade, profession or occupation both within and without New York State, the items of income . . . attributable to such business, trade, profession or occupation must be apportioned and allocated to New York State on a fair and equitable basis in accordance with approved methods of accounting.

* * *

§ 132.18 *Earnings of nonresident employees and officers.*

(a) if the nonresident employee ... performs service for his employer both within and without New York State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State.... *However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.* In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay. (Emphasis added)

It is the application of the highlighted portion of section 132.18(a) to petitioners' circumstances which causes the dispute in this case.

E. As a starting point, it is well settled that a nonresident employed by a New York employer is not subject to the convenience of the employer test of 20 NYCRR 132.18(a) when he works outside of New York, performs no work within New York, and has no office or place of business in New York (i.e., where suitable facilities to carry out his employment duties are not maintained for or available to him in New York) (***Matter of Linsley v. State Tax Commn.***, 38 AD2d 367, 329 NYS2d 486, ***affd*** 33 NY2d 863, 352 NYS2d 199; ***Matter of Gleason v. State Tax***

Commn., 76 AD2d 1035, 429 NYS2d 314; ***Matter of Hayes v. State Tax Commn.***, 61 AD2d 62, 401 NYS2d 876). In these circumstances the so-called "place of performance doctrine" applies and the out-of-state location where the employee's services are performed, rather than the location of the employer paying for such services, is determinative for income sourcing and taxation purposes (***Matter of Speno v. Gallman***, 35 NY2d 256, 260, 360 NYS2d 855, 858; ***see*** 20 NYCRR 132.4[b]). In contrast, however, 20 NYCRR 132.18(a), and the many cases addressing and upholding the disputed portion of such regulation as valid, provide that where a nonresident individual employed by a New York employer performs services both at the employer's New York facility and at his out-of-state home, under circumstances where the services could have been performed at the employer's in-state facilities, such services are performed out of state for the employee's convenience and not for the employer's necessity (***Matter of Speno v. Gallman, supra; Matter of Phillips v. New York State Dept. of Taxation and Finance***, 267 AD2d 927, 700 NYS2d 566, ***lv denied*** 94 NY2d 763, 708 NYS2d 52; ***Matter of Kitman v. State Tax Commn.***, 92 AD2d 1018, 461 NYS2d 448; ***Matter of Wheeler v. State Tax Commn.***, 72 AD2d 878, 421 NYS2d 942; ***Matter of Colleary v. Tully***, 69 AD2d 922, 415 NYS2d 266; ***Matter of Fass v. State Tax Commn.***, 68 AD2d 877, 414 NYS2d 780, ***affd*** 50 NY2d 932, 431 NYS2d 526; ***Matter of Simms v. Procaccino***, 47 AD2d 149, 365 NYS2d 73; ***Matter of Page v. State Tax Commn.***, 46 AD2d 341, 362 NYS2d 599). As a result, where a nonresident employee chooses to work at home and is not obligated or compelled by some necessity to work for his New York employer at such out-of-state location, the compensation for the employee's services on such days is held to be New

York source income properly subject to tax by New York (***Id***). In effect, the result of applying the convenience test is to limit apportionment and allocation of income out of New York (to the state where the services were performed), in favor of attributing such income to New York. In turn, New York tax is imposed on the income the nonresident earned while physically located and working out of state. In addition, where the employee's home state sources income based only on physical presence, the employee will pay income tax to that state unless such state affords a credit to offset the New York tax. Thus, "double" taxation results where, as here, different rules for sourcing income leave both states claiming to be the source of the employee's income. The real question then is who, if anyone, is under an obligation to ameliorate this result. In fact, the issue as focused is whether sourcing based on physical presence is the only acceptable apportionment method, with sourcing under a rule such as the convenience test prohibited *per se*, or at least prohibited where, in conjunction with the tax system of another jurisdiction, it results in some level of double taxation.

F. As set forth above, the convenience test portion of 20 NYCRR 132.18(a) has been applied and discussed in numerous cases in New York. In ***Matter of Speno v. Gallman (supra)***, the Court of Appeals specifically confirmed the validity of the convenience versus necessity test, holding that the justification for the rule is that since a resident of New York would not be entitled to any special tax benefit for work done at home, neither should a nonresident who performs services or maintains an office in New York (***see, Matter of Burke v. Bragalini***, 10 AD2d 654, 196 NYS2d 391). Specifically, the Court in ***Speno*** stated the following:

> In view of the large number of nonresidents who avail themselves of employment within New York State, the place of performance doctrine was refined by virtue of the "convenience of the employer" test. Under this refinement, a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-state services are performed for the employee's convenience they generate New York State tax liability.
>
> . . . The policy justification for the "convenience of the employer" test lies in the fact that since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services or maintains an office in New York State. . . .

In ***Matter of Colleary v. Tully (supra)*** the Appellate Division reaffirmed the validity of the rule and also specifically rejected a challenge thereto based on Due Process and Commerce Clause grounds, stating the following:

> Petitioner's next contention is that the 'convenience of the employer' test is unconstitutional because it causes an unfair apportionment of taxable and non-taxable income due to inaccurate correlation of the apportionment to income earned within the State. It is said that this unfair apportionment is a violation of the Commerce Clause of the United States Constitution. The argument is without merit. The 'convenience of the employer' test merely serves to protect the integrity of the apportionment scheme by including income as taxable where it results from services substantially connected with New York but performed outside New York to effect a subterfuge. Moreover, the

> validity of the test has met with approval in ***Matter of Speno v. Gallman, supra,*** (citations omitted) (***Matter of Colleary v. Tully, supra.***).

In the context of due process, the Court in ***Colleary*** went on to note that "the source of an out of State employee's income is the employer within the State. Thus, the employment relationship is important in establishing the necessary connection with [the] State" (***Id.***)

In the later decided ***Matter of Kitman v. State Tax Commn. (supra)*** the Appellate Division stated that "[b]ecause of the obvious potential for abuse, where the home is the workplace in question, the [former State Tax Commission] has generally applied a strict standard of employer necessity in these cases, which, with rare exception, has been upheld by the courts [citations omitted]."

G. Given the numerous instances where the convenience test has been applied and upheld, including specifically the ***Speno*** and ***Colleary*** cases which upheld the test as valid and rejected a challenge thereto based on commerce clause and due process grounds, the inquiry would appear to be ended. However, in ***Speno*** and ***Colleary*** the courts justified the convenience test on the bases that it served to curtail a special tax benefit available to nonresident employees but not available to resident employees, and that it protected the integrity of the apportionment scheme required under Tax Law § 631(c) and implemented via 20 NYCRR 132, by preventing income otherwise taxable to New York from escaping taxation via subterfuge. Stated differently the convenience rule, which limits what would otherwise be required apportionment, was held to be a necessary and reasonable refinement serving to prevent nonresidents employed in New York and ordinarily subject to tax by New York on the income from such

employment (like their resident counterparts), from enjoying a tax advantage over their similarly employed resident counterparts by the subterfuge (or simple expedient) of choosing to work at home. It appears undisputed that, but for the convenience test, petitioner's employment income would be apportioned and allocated, under Tax Law § 631(c) and the implementing regulations, in part to petitioner's home state of Connecticut based on the number of days he worked there. Thus, the question is not whether apportionment is required, but rather whether the rationale for the exception to such required apportionment is justified under the instant circumstances where the abuse, subterfuge and special tax benefit considerations are allegedly no longer present or available.

H. Obviously, the "special tax benefits" and the "subterfuge" spoken of in ***Speno*** and ***Colleary***, respectively, become possible when a nonresident lives in a state which does not impose an income tax or imposes an income tax at a rate which is significantly lower than the tax rate in New York. Without a rule such as the convenience test, the nonresident employed in New York may gain a clear tax benefit over a New York resident so employed simply by choosing (if not planning) to stay at home to work. That is, the nonresident apportions and allocates income on such days out of New York to his no (or comparatively lower) tax residence state and escapes some or all tax on the related income, whereas the resident who works at home realizes no such special benefit when he, too, chooses to work at home. In this case, it is undisputed that petitioner is subject to tax by his residence state of Connecticut on the portion of his Cardozo salary based on days he worked at home in Connecticut, with no credit afforded by Connecticut for New York tax imposed on such

income attributed to New York via the convenience test. Therefore, petitioner claims that the justification for the convenience test, i.e., that nonresident taxpayers can manipulate their New York tax liability by work location choice whereas a New York resident similarly employed cannot, is vitiated under his circumstances (and indeed under any similar circumstances where the home state imposes an income tax). Petitioner, as noted earlier, does not seek a determination that the portion of the regulation in issue (the convenience test) is invalid in all cases. In fact, the Courts' concerns about special tax benefits for a nonresident over a resident, and about the incentive for abuse and subterfuge to gain such a benefit, would apparently remain unquestionably valid in situations where the nonresident's home state does not impose an income tax on the income in issue. The question thus becomes further refined to whether the convenience test remains valid under circumstances where the tax benefit or differential between the resident and the nonresident employee is mitigated as in this case because the nonresident's home state imposes a tax on the income at issue.

I. While a multitude of New York cases have applied and upheld the convenience test, those cases have focused mainly on the factual distinction between "convenience" and "necessity" (Conclusion of Law "E", ***supra.; see, e.g., Matter of Phillips v. New York State Dept of Taxation and Finance, supra***). In ***Matter of Colleary (supra)*** where the constitutional issues were raised and rejected, and in ***Matter of Speno (supra)***, where the convenience test was specifically held to be valid, the Courts were principally concerned with the potential for tax disadvantage to the New York resident employee versus his counterpart nonresident employee and the potential for abuse

available under apportionment based solely on the physical presence of the employee performing the services. It is at least noteworthy that for the tax years in question in those cases New Jersey, the residence state of both of the taxpayers, did not impose a general income tax in the manner of that which is imposed today (***see***, New Jersey Gross Income Tax Act, NJ Rev Stat § 54A:1-1, *et seq.*, effective July 1, 1976), thus perhaps crystallizing the concern over income source manipulation with its resultant possible special tax benefit. Nonetheless, the New York courts have subsequently upheld and justified the convenience test as valid, leaving only for discussion petitioner's argument that the justification for the rule is no longer valid because times and circumstances have changed and the states surrounding New York, including Connecticut, now impose income taxes resulting in multiple taxation of the same income in violation of due process and commerce clause standards (***see***, Conn Gen Stat § 12-700, *et seq.*, effective January 1, 1991).

J. Petitioner argues that as applied to his circumstances, the convenience of the employer test of 20 NYCRR 132.18(a) violates the Due Process Clause and the Commerce Clause of the United States Constitution. Petitioners' position, at its succinct essence, is that income from employment is not only subject to apportionment when the employee performs services for his employer in more than one jurisdiction but moreover must be, where at all feasible, apportioned based on the physical location of the employee at the time the services are performed. Hence, petitioner claims that his salary income from Cardozo Law School should simply be apportioned between New York (where his employer Cardozo is located) and Connecticut (where he lives and sometimes chooses to perform work for

his employer) based on the respective number of days on which petitioner actually performed services for his employer in each of such jurisdictions. He argues that on days when he does not work at his employer's facilities in New York, but rather chooses to remain at home to work, New York is constitutionally precluded from treating such days as New York working days.

K. The issue of whether a state's method of taxation results in a prohibited deprivation of property under the Due Process Clause (US Const, 14th Amend, § 1), which states "nor shall any State deprive any person of life, liberty or property without due process of law," may be resolved by determining "whether the taxing power exerted by the state bears fiscal relation to the protections, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." (***Wisconsin v. J.C. Penney, Co.***, 311 US 435.) In ***Quill Corp. V. North Dakota*** (504 US 298, 119 L Ed 2d 91), the Supreme Court stated the following:

> The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' ***Miller Bros. Co. V. Maryland***, 347 US 340, 344-345, 98 L Ed 744, 74 S Ct 535 (1954), and that the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State."' ***Moorman Mgf. Co. v. Bair***, 437 US 267, 273, 57 L Ed 2d 197, 98 S Ct 2340, (1978) ***(Quill Corp. V. North Dakota, supra***, 119 L Ed 2d at 102).

Thus, for Due Process purposes, to validate the result of applying the convenience test leaving petitioner's

Cardozo salary sourced or attributed entirely to New York rather than apportioned within and without New York, there must be some link between the taxing State (New York), petitioner, and the income at issue, and there must be some reasonable relationship between the amount of income subject to tax and the extent of petitioner's activities in New York.

L. Petitioner also argues that his cross border commute to pursue and engage in his employment and his performance of employment activities in the two jurisdictions constitutes interstate commercial activity subject to commerce clause protection. He maintains, in turn, that the convenience of the employer test, as applied to the circumstances of this case, runs afoul of the Commerce Clause of the United States Constitution (US Const, art I, § 8, cl 3), which provides that Congress is vested with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." A state tax affecting interstate commercial activity violates the Commerce Clause unless it "is [1] applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, [4] and is fairly related to the services provided by the State" (***Complete Auto Transit v. Brady***, 430 US 274, 279, 51 L Ed 2d 326, 331). While due process is concerned with preventing unwarranted deprivations of property under concepts of fundamental fairness (the relationship of the state exacting tax to the benefits, opportunities and protections afforded by the state to the subject being taxed), the Commerce Clause is concerned with excessive regulation or unwarranted burdens disrupting or restricting the free flow of commerce and equal access to economic markets.

M. Petitioner here challenges only the second prong of the four-part test enunciated in ***Brady***, to wit, the requirement that the tax be "fairly apportioned." States have been accorded a fair degree of flexibility with respect to choosing methods of income apportionment (***see, Moorman Manufacturing Co. v. Bair, Director of Revenue of Iowa***, 437 US 267, 57 L Ed 2d 197). However, the "fairness" of an apportionment method, or here the validity of a test which when applied results in an apportionment of income not based only on the physical presence of the income recipient, is judged by whether the resulting income allocation and imposition of tax is both internally and externally consistent (***Goldberg v. Sweet***, 488 US 252, 261, 102 L Ed 2d 607; ***Container Corp. of America v. Franchise Tax Bd.***, 463 US 159, 77 L Ed 2d 545). "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear" (***Oklahoma Tax Commn. v. Jefferson Lines***, 514 US 175, 185, 131 L Ed 2d 261). "External consistency, on the other hand, looks . . . to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State" (***id.***, at 185). Thus, internal consistency serves to avoid multiple taxation occasioned by the imposition of multiple identical taxes by multiple jurisdictions. In this case, the question becomes whether multiple identical taxation would result if every other jurisdiction imposed a sourcing or attribution regulation identical to New York's version of 20 NYCRR 132.18(a), including the convenience test, to determine where to apportion and allocate employment income. External consistency, on the other hand, questions

whether the tax resulting from the application of 20 NYCRR 132.18(a) is justifiably proportionate to the taxpayer's business activities in the taxing state.

N. Treated first is petitioner's due process argument. On this score, the portion of petitioner's employment income from Cardozo deemed New York source income via 20 NYCRR 132.18(a) is sufficiently connected to New York and does not reflect disproportionate attribution of income so as to require cancellation of the resulting tax imposed thereon. First, the Court in ***Matter of Colleary v. Tully (supra)*** specified that employment income is connected to New York via the fact that the employer is located here. In turn, petitioner's employer in New York maintains offices and facilities at its place of business which are available to petitioner and suitable for the performance of his employment duties, including those duties he performs by choice at his Connecticut residence. There is no basis in the record for concluding that petitioner's work at home was "ancillary" to his employment, as opposed to part and parcel of the duties imposed on and expected of him by his employer. Likewise, there is no claim that petitioner's choice to work at home on certain days was specifically motivated by tax considerations. Indeed, it is undisputed that petitioner was subject to Connecticut tax on the income in question. At the same time, however, there is no claim or evidence that petitioner was required by his employer or by other circumstances to perform any of his employment duties outside of New York on any of the days in question, and it appears the sole motivation for doing so

was choice and convenience.[4] Further, his salary from Cardozo appears to have been entirely connected with and resulted from his duties as a professor of law for this New York employer. Thus, it cannot be said that the income in question bears no reasonable connection or fair relationship to New York such that subjecting the same to New York income tax violates due process standards.

Petitioner enjoys the benefits of employment opportunities offered in New York. The regulation at 20 NYCRR 132.18(a) simply serves to preclude any differential treatment or special benefit arising from engaging in such employment in New York but choosing (for whatever reasons) to perform certain employment duties elsewhere. Petitioner enjoys the same benefits of New York employment as do his in-state counterpart employees. Petitioner is not impeded in traveling to New York, for employment, by some additional tax imposed against him by New York but not imposed against his in-state counterpart, nor are any New York services denied to petitioner. Petitioner may utilize the New York courts for resolving disputes, including labor and other disputes with his employer, and he benefits from a regulated labor market, as well as from fire, police, emergency health and other services. His choice not to be present in New York to carry out his employment duties on certain days does not diminish the availability of or the costs associated with these items. It cannot be said that sourcing income to New York on the

[4] Though not specified in the record certain benefits of choosing to work at home in lieu of commuting, including travel expense savings as well as perhaps time savings enabling more efficient use of work time, appear self-evident.

convenience or choice days subjects to New York tax income that is not fairly attributable to petitioner's overall economic activities within New York (***Oklahoma Tax Commission v. Jefferson Lines, Inc.***, 514 US 175, 131 L Ed 2d 261).

O. Turning to petitioner's commerce clause arguments, the initial question is whether petitioner is engaged in interstate commerce such that he is entitled to the protections afforded under the commerce clause. Petitioner likens his circumstances of splitting his working days between his employer's facilities and his home to a business which carries out its income producing activities in more than one jurisdiction. While petitioner cites a number of cases to support the claim that he is engaged in interstate commerce, this claim is not borne out. In fact, neither petitioner nor his employer appear to be involved in interstate commerce. There is no evidence that petitioner's teaching duties constitute an interstate activity. The fact that petitioner lives in one state but is employed in another, and the fact that he performs his employment duties in two jurisdictions, are both simply the result of his choice to do so. These circumstances, resulting from choice, do not in either regard elevate petitioner's activities into interstate commerce. The commerce clause may be invoked to invalidate state measures which "unjustifiably . . . discriminate against or burden the interstate flow of articles of commerce" (***Oregon Waste Systems v. Department of Envtl. Quality of Ore.***, 511 US 93, 128 L Ed 2d 13). Under the facts of this case there is no apparent interstate market substantially impacted by the convenience test embodied in 20 NYCRR 132.18(a). There is no apparent burden to any interstate flow of articles of commerce. In this case, the potentially regulated "activity,"

if any, would appear to be petitioner's choice to work at home rather than to commute and work at his employer's facilities in New York. This activity or choice does not have any substantial impact on interstate commerce (***see*** Conclusion of Law "P"). To the extent it could be said that the regulation might impact a nonresident's (such as petitioner's) choice as to work location, it does not do so to provide any advantage to an in-state individual employed by petitioner's employer. Rather, it serves to place these employees on an equal footing vis-a-vis New York tax on their New York employment income.

P. The convenience test does not subject petitioner to New York tax because he commutes from Connecticut to New York to work at offices maintained for and made available to him here. Rather, he is subject to tax because he is employed here. In ***Matter of Tamagni v. Tax Appeals Tribunal*** (91 NY2d 530, 673 NYS2d 44), the Court of Appeals sustained the imposition of New York income tax on income from intangible assets against taxpayers who were statutory residents of New York, notwithstanding that the taxpayers were also domiciliaries of New Jersey and that New Jersey subjected the same income from intangible assets to its income tax. The Tamagnis argued that the income should be apportioned and sourced only to New Jersey, under the position that the situs of intangibles and hence the income derived therefrom should be based on the location of their owner. The Court rejected this argument and sustained the New York tax because it was imposed based on petitioners' status as residents of New York. The Court characterized such taxation as based on a "purely local occurrence" rather than based on interstate activities engaged in by petitioners. The Court noted, over one dissent, that there

was no commerce clause implication resulting from Mr. Tamagni's daily commute from New Jersey to New York where he worked as an investment banker and participated in economic activities.[5]

In ***Tamagni***, a case decided after the Supreme Court's decision in ***Camps Newfound/Owatonna, Inc. v. Town of Harrison*** (520 US 564, 137 L Ed 2d 852), the Court of Appeals focused its commerce clause analysis on identifying similarly situated in-state and out-of-state interests being subjected to differential treatment, and found none. In petitioner's case, the common denominator is employment in New York, and in-state as well as out-of-state individuals employed in New York are simply not treated differently vis-a-vis the New York tax imposed on their employment income as a result of apportionment determined by applying the convenience test of 20 NYCRR 132.18(a). Rather, in result, they are treated equally.

Q. In ***Camps Newfound/Owatonna, Inc. v. Town of Harrison (supra)***, a Maine property tax exemption available to in-state summer camps serving primarily Maine residents but not available to in-state summer camps serving primarily out-of-state residents, was struck down on commerce clause grounds as discriminating against interstate interests so as to result in advantage to in-state interests. The Court held that because some 95

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[5] The Appellate Division was even more direct in its opinion in ***Tamagni***, holding unequivocally that the practice of commuting from one state to another and partaking of various daily economic activities before returning home, did not produce the requisite effect to be considered engaged in interstate commerce. (***Matter of Tamagni v. Tax Appeals Tribunal***, 230 AD2d 417, 659 NYS2d 515).

percent of the campers attending the effectively higher taxed camps came from out of state, the taxing scheme implicated an identifiable interstate market (i.e, nonresident camp attendees) and thus implicated interstate commerce. In practical effect the out-of-state campers were, by the impact of the different (beneficial) tax treatment accorded certain in-state camps, apparently discouraged from attending the camps serving them because the additional tax cost of the exemption not available to the camps serving them would be borne by such out-of-state campers traveling to Maine. Unlike the exemption in ***Camps Newfound,*** however, the regulation at issue here does not promote the interests of in-state employees at the expense of nonresident employees based on the latter's interstate movement or activities. Rather, it places such employees on an equal New York tax footing with each other. Any burden resulting from petitioner's choice to work at home or any discouragement from doing so comes not from the New York regulation and its convenience test, but rather from Connecticut's choice not to allow a credit for New York taxes paid on income connected with petitioner's New York employment. In sum, there is simply no interstate interest or activity impacted by the regulation at issue comparable to the nonresident campers whose attendance at camps serving them primarily was discouraged by Maine's differential tax treatment of such camps, resulting in advantage to other camps serving primarily resident campers (***Camps Newfound/Owatonna, Inc. v. Town of Harrison, supra.***), or to the nonresident commuters who were subjected to tax on their commute to New York City while resident commuters were not so subject (***City of New York v. State of New York***, 94 NY2d 577, 709 NYS2d 122), or to the common carrier whose buses traversed in-state and out-of-state routes

(with the latter constituting some 43 percent of its receipts) subjected to tax by New York on all receipts without apportionment (***Central Greyhound Lines, Inc. v. Mealey***, 334 US 653, 92 L Ed 1633). The regulation does not prevent, limit or discourage petitioner from traveling to his employer's place of business in New York to carry out his employment duties at the facilities provided and maintained there for such purposes. In short, petitioner identifies no similarly situated commercial interests or activities being disparately treated by New York's apportionment of his employment income under the regulation and its convenience test.

R. Assuming petitioner's circumstances of commuting from Connecticut across the border to New York to engage in employment, and his choice to perform employment duties in two states, constitutes commercial activity subject to the protections afforded under the Commerce Clause, the question becomes whether the result of applying the convenience test, under which petitioner becomes subject to tax in New York in addition to Connecticut, constitutes invalid denial of fair apportionment resulting in invalid taxation by New York. As noted above, the two overriding considerations as to whether there is fair apportionment are the internal and external consistency of the measure imposed (***Goldberg v. Sweet, supra.***).

With respect to internal consistency, if every other jurisdiction adopted the convenience test as does New York, no multiple taxation would occur. That is, while New York sources the nonresident's income to New York on days when he physically works outside of New York for his own convenience as opposed to some necessity, New York also consistently applies the convenience test in sourcing income for purposes of the New York credit afforded under

Tax Law § 620 against the tax that New York residents pay to other jurisdictions upon income derived from sources in such other jurisdictions. Specifically, to qualify for the credit, the tax imposed by the other jurisdiction must be imposed on income "derived therefrom" (Tax Law § 620[a]). Under the implementing regulations, "the resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction" (20 NYCRR 120.1[a]; 120.4[d]). In fact, 20 NYCRR 120.4(d) provides, as a definition, that "*[i]ncome derived from sources within* another state . . . is construed so as to accord with the definition of the term *derived from or connected with New York State sources*, as set forth in Part 132 of this Title in relation to the adjusted gross income of a nonresident individual." (Emphasis as in original.)

S. Applying the foregoing to the situation reciprocal to petitioner's, i.e., where a New York resident is employed in Connecticut but chooses to work at home in New York on certain days, New York would include his employment income as New York income subject to tax (residents are generally subject to tax on income from all sources) but would also, consistently, source the income on the "choice to work at home" days as derived from Connecticut for purposes of allowing the credit against New York tax based on the tax due Connecticut on such income. Similarly, if Connecticut (or any other state) adopted a convenience test identical to the New York test, the Connecticut resident in petitioner's circumstances would have New York source income on the days worked by choice at home,

with such income subject to New York tax. He would also pay Connecticut tax on such income as a resident (as does petitioner). However, he would also receive a resident credit against Connecticut resident income tax because Connecticut would recognize the New York sourcing of such income per the convenience test it had adopted, thus eliminating multiple taxation. Accordingly, if an identical convenience provision was adopted by Connecticut, no multiple taxation would result and, thus the convenience test does not fail the internal consistency requirement of fair apportionment. The problem is that Connecticut does not recognize and has not adopted the convenience test. This, however, is not a basis upon which to invalidate such test for New York purposes. In fact, if Connecticut were to adopt an identical convenience test regulation, the same would simply be viewed as reciprocal rather than retaliatory or discriminatory.

T. With regard to external consistency, the consideration is much like that for due process. The question is whether the employment income being attributed to New York and subjected to tax as a result of the convenience test, notwithstanding the out-of-state physical presence of the income recipient on certain days, is nonetheless sufficiently connected to New York sources and activities. The test of external consistency focuses on the relationship between the tax and how the income being subjected thereto is generated. Thus, there must be some connection between the value (income) being taxed and the state (here New York) doing the taxing. As outlined previously, there is sufficient connection of the income to New York which, together with the justification for the convenience test, overcomes concerns that the amount of income taxed

by New York is out of all proportion to the ties between New York, the income and its recipient.

U. Petitioner essentially admits that the "special tax benefit" and the "subterfuge" spoken of may arise where the nonresident lives in a state which does not impose an income tax, thus leaving the nonresident employed in New York but choosing to work at home at a clear tax advantage over a New York resident. In this case, however, it is argued that petitioner Edward A. Zelinsky would not receive such a tax benefit, for Connecticut imposes an income tax and has subjected his income related to the days worked at home to such income tax. Notwithstanding this latter fact, the stated justification for the convenience test, i.e., concerns about tax motivated work location choices and disparate (disadvantaged) treatment to New York residents as a result remain present. It does not simply follow from the holdings in ***Colleary*** and ***Speno*** that the concerns justifying the convenience rule are alleviated entirely when or if the nonresident's home state simply imposes an income tax. Enactment of an income tax alone is not sufficient to invalidate the rule because it remains that tax rate differentials between states can still result in a substantial tax benefit, i.e., under circumstances where the nonresident's home state imposes a tax at a rate lower than that imposed by New York. In fact, the courts did not quantify the degree of tax benefit to be avoided by the rule. States with no income taxes, as well as those with rate differentials, or noncomparable deductions, exemptions and exclusions, all give rise to potential differential treatment and support the validity of the convenience rule. These considerations serve to highlight the problems presented in judging the convenience rule against the myriad possible taxing structures of other

states on a case-by-case basis, to decide which differentials might be significant enough to justify the rule and which ones do not rise to such level. This approach also fails to consider the fact and impact of possible repeals as well as enactments of taxes by other states.

V. In sum, the application of 20 NYCRR 132.18(a) under the circumstances at hand does not violate either due process or commerce clause standards. Stripped to its essence, petitioner's claim is that he was not physically present in New York on the days in dispute (the days worked at home upon which his apportionment and allocation of income was based), but rather was physically present working in Connecticut. Hence, petitioner claims the income must be apportioned to Connecticut, i.e., the income should follow the physical presence of its recipient. In contrast, New York has imposed a limitation on this approach based on the issue of choice, to wit, the choice of the income recipient to work at home. New York justifies this limitation because its result is to treat residents and nonresidents employed in New York on an equal footing, with neither receiving any special tax benefit resulting from their choice to work at home rather than at their employer's facilities. That is, all resident and nonresident employees, including petitioner, are potentially subject to New York tax on their entire New York employment income. On days when they physically work in New York, each is subject to tax on such income. In turn, under 20 NYCRR 132.18(a) and its convenience test, the nonresident employee remains subject to New York tax on employment income as does the resident employee on days when they choose their work location (specifically when the choice is to work at home), such that neither reaps any tax benefit or advantage over their counterpart as a result

of this choice. Finally, each may avoid New York tax when they are unable to choose their work location (i.e., when performing out-of-state work due to employer necessity or requirement) and are subject to tax by another jurisdiction. That is, the nonresident employee is entitled to apportion and allocate income out of state on such days while the resident employee is entitled to have the income on such days recognized as non-New York source income for purposes of the resident credit under Tax Law § 620 (***see*** Conclusion of Law "R"). Thus, the apportionment and allocation rules are in symmetry and do not unfairly apportion to the advantage of the resident versus the nonresident employee. Simply because Connecticut does not, under its physical presence sourcing rules, recognize the income in question as New York source income, and instead taxes the same as Connecticut source income without credit for taxes paid to New York, does not serve to invalidate the regulation in issue as applied to petitioner or require New York to disavow the income as New York source income properly subject to tax. The New York regulation and its convenience test does not impose any New York tax on a nonresident employed in New York that is not also imposed on any resident so employed in New York. Rather, it only prevents him from reaping any tax benefit not generally available to all persons similarly employed in New York (***see*** Conclusion of Law "U"). The regulation does not cause any predictably disproportionate New York tax burden to fall on all out-of-state (nonresident) employees. That burden, if any, results in this case from the manner in which Connecticut chooses to subject its residents to tax, a matter clearly within its purview (***Matter of Tamagni v. Tax Appeals Tribunal, supra***). The regulation is not aimed to disadvantage petitioner but, as noted, to equalize all similarly situated persons

(residents and nonresidents) employed in New York. That petitioner is taxed by two jurisdictions under these circumstances cannot be said to result from an apportionment rule applied by New York in contravention of the commerce clause or the due process clause.

Ultimately, petitioner pays a price for choosing to work at home. However, that price is not exacted when he has no choice in the matter. The problem lies with two states having valid, though different, sourcing rules. New York's rule has been upheld on numerous occasions. It is not designed to burden out-of-state interests so as to benefit in-state interests. In justifying the convenience test neither ***Colleary*** nor ***Speno*** quantified the possible disparate benefit to be eliminated by the test, and there is no proof that, although petitioner is subject to tax on his New York employment income by his home state of Connecticut, the benefit the rule is designed to eliminate has been entirely eliminated. To conclude otherwise would be out of harmony with the reasoning and result reached in those cases.

W. The petition of Edward A. Zelinsky and Doris Zelinsky is hereby denied; the notices of deficiency dated March 16, 1998 are sustained; and petitioners' request for a refund for the year 1995 is denied.

DATED: Troy, New York
Nov. 2, 2000

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW
JUDGE

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition of Edward A. and Doris Zelinsky Under Articles 22 and 30 of the Tax Law for Redetermination of a Deficiency for the Year 1994 and for Refund and Redetermination of a Deficiency for the Year 1995	Stipulation of Facts DTA # 817065

The Petitioners and the Division of Taxation hereby stipulate and agree for purposes of this proceeding to the following facts:

1) The Petitioners, Edward A. and Doris Zelinsky, are residents of the State of Connecticut. Edward A. Zelinsky is a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University in New York City. Doris Zelinsky is employed in Connecticut and has no New York source income.

2) In 1994 and 1995, Professor Zelinsky's duties involved preparing for and teaching classes, meeting with students, preparing and grading examinations, writing recommendations for students, and conducting scholarly research and writing. During the years in question, 1994 and 1995, articles written by Professor Zelinsky appeared in the Berkeley Journal of Employment and Labor Law, the Cornell Journal of Law and Policy, the Virginia Tax Review, and Tax Notes.

3) In 1994, Professor Zelinsky worked in New York for eighty-four (84) days. Specifically, for the twenty-eight (28) weeks constituting the two academic semesters of 1994, Professor Zelinsky commuted from Connecticut to

the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each semester week in 1994, Professor Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations, and conducting scholarly research and writing.

4) During the remaining weeks of 1994 before and after the academic semesters, Professor Zelinsky did not commute to New York City. During these nonsemester weeks of 1994, he worked exclusively in Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations, and conducting scholarly research and writing.

5) In 1995, Professor Zelinsky worked in New York City for forty-two (42) days. Professor Zelinsky was on sabbatical leave during the fall semester of 1995. For the fourteen weeks of 1995 constituting the spring semester, Professor Zelinsky commuted from Connecticut to the Cardozo Law School in New York City three days per week, mainly to teach classes and meet with students. On the other two days of each spring semester week in 1995, Professor Zelinsky worked at his principal residence in New Haven, Connecticut, preparing examinations, writing recommendations, and conducting scholarly research and writing.

6) During the remaining weeks of 1995 before and after the spring semester, Professor Zelinsky did not commute to New York City. During these nonteaching weeks of 1995 (including the fall of 1995 when he was on sabbatical leave), Professor Zelinsky worked exclusively in

Connecticut, both at his principal residence in New Haven, Connecticut and at his secondary residence in Branford, Connecticut, grading examinations, writing recommendations, and conducting scholarly research and writing.

7) On the 1994 and 1995 New York nonresident income tax returns filed by the taxpayers, Professor Zelinsky apportioned his salary from the Cardozo Law School to New York on the basis of the days in each of these years he actually commuted to and was physically present in New York City. The notices of deficiency disregard that apportionment and tax Professor Zelinsky on his entire salary from the Cardozo Law School, irrespective of the number of days Professor Zelinsky worked at home in Connecticut.

8) The Petitioners petition for redetermination of a deficiency for the year 1994 and for refund and redetermination of a deficiency for the year 1995. These deficiencies are asserted in notices of deficiency issued by the Audit Division which notices are dated March 16, 1998.

9) The taxes asserted in such notices of deficiency are New York State and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law. The taxes for which the Petitioners claim refund are also New York State and New York City personal income taxes levied per Articles 22 and 30 of the Tax Law.

10) The amount of additional tax asserted by the Audit Division for 1994 is $6,038.54, all of which the Petitioners contest. The amount of additional tax asserted by the Audit Division for 1995 is $6,246.11, all of which the Petitioners contest. In addition, for 1995, the Petitioners request a refund of ($2,719).

11) A conciliation conference in the Bureau of Conciliation and Mediation Services was requested and held as requested. A conciliation order, sustaining the deficiencies and rejecting the refund, was issued on March 26, 1999.

12) The deficiencies and the rejection of the Zelinskys' refund request are premised on the employer convenience doctrine. The parties agree that, if that doctrine can constitutionally be applied in this case, the deficiencies and the rejection of the refund are correct. The sole issue for decision is the constitutionality of the employer convenience doctrine on the facts of this case.

IN WITNESS WHEREOF, the parties have executed this Stipulation on the dates adjacent to their signatures below.

Dated: August 5, 1999 /s/ Edward A. Zelinsky
Edward A. Zelinsky, Petitioner

/s/ Doris Zelinsky
Doris Zelinsky, Petitioner

Dated: August 26, 1999 NYS Department of Taxation and Finance

By: /s/ Margaret Neri

20 NYCRR § 132.18(a)

@ 132.18 Earnings of nonresident employees and officers

(a) If a nonresident employee (including corporate officers, but excluding employees provided for in section 132.17 of this Part) performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the services of his employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay.

Example 1: A, a resident of Connecticut, is an officer and substantial stockholder of the X Corporation, having its principal office in New York City. During the taxable year, A performs the following services for X Corporation:

Services performed for X Corporation wholly within New York State. 210 days

Sales conventions in Hot Springs, Ark. and Miami, Fla. (A passed through New York State to board airplanes on four of these days.) 10 days

Calling on customers in Pacific Coast states. 20 days

A's salary from the X Corporation is $40,000 per year.

A's New York adjusted gross income is determined as follows: Total number of working days within New York State (210) divided by total number of working days both within and without New York State (240) is 210/240 or 87.5 percent, which, when applied against A's salary of $40,000, equals $35,000, A's New York adjusted gross income. Days on which A entered New York State solely for the purpose of boarding or disembarking from an airplane or train do not count as days worked in New York State.

Example 2: B, a resident of New Jersey, is an employee of the X Corporation, having its principal office in New York City. During the taxable year, B was sent to Chicago by X Corporation to help establish a new sales office. All other services which he performed for X Corporation were performed wholly within New York State. B passed through New York State to board a plane on Sunday, March 31st, and to disembark on Friday, April 26th. While in Chicago, B held meetings in his hotel room on Saturday, April 6th, and Saturday, April 20th. B allocates 217 working days to New York State as follows:

Total days in year 365

Nonworking days:

Saturdays and Sundays (there are 104 Saturdays and Sundays; however, since the Sunday spent traveling and the two Saturdays spent holding meetings in his hotel room in Chicago are to be included in total working days, these days are not included in nonworking days).	101
Holidays	11
Sick leave	3
Vacation	10
Total nonworking days	125
Total days worked during year (365 minus 125)	240
Total days worked outside New York State. (A total of 27 days was spent in Chicago; however, four of these days are Saturdays or Sundays on which no services were rendered for his employer and are included in nonworking days, not in days worked outside New York State. Therefore, in determining the total number of days worked outside New York State, B includes the 20 normal working days spent in Chicago, plus the Sunday spent traveling, plus the two Saturdays spent holding meetings in his hotel room.)	23
Total days worked in New York State (240 minus 23)	217

* * *

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
THOMAS L. HUCKABY
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1994 and 1995.

DECISION
DTA NO. 817284

Petitioner Thomas L. Huckaby, 124 Taggart Avenue, Nashville, Tennessee 37205-4427, filed an exception to the determination of the Administrative Law Judge issued on February 8, 2001. Petitioner appeared by McDermott, Will and Emery (Peter L. Faber, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 12, 2001 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether Tax Law § 631(b) permits the Division of Taxation to tax a nonresident on compensation for services that are performed out of state.

II. Whether application of the convenience of the employer test results in the taxation of income out of all proportion to petitioner's contacts with, and benefits from, New York State in violation of the United States Constitution.

III. Whether the Division of Tax Appeals should award petitioner reasonable administrative and litigation costs, including attorney's fees.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Thomas L. Huckaby was domiciled in Nashville, Tennessee. He did not maintain a permanent place of abode in New York State nor did he spend more than 183 days in New York State in either of the years in issue. He was not a resident of New York State within the meaning of section 605(b) of the Tax Law.

Petitioner was an employee of Multi-User Computer Solutions ("MCS") of Nashville, Tennessee, from 1983 until July 1991. He lived and worked in Nashville during this period and was domiciled in Tennessee.

MCS was engaged in the business of developing and selling computer software.

Petitioner's duties for MCS consisted of developing and servicing computer programs and advising MCS's customers with respect to their use.

Petitioner has a Bachelor of Science degree with a major in accounting. Before his MCS employment, petitioner developed and implemented a Basic Language payroll program and a Medicare/insurance billing program while working as controller for a Tennessee home healthcare agency. While working for MCS he developed an expertise in computer programming and transitioned from a single-user to a multi-user computer environment. Subsequent to petitioner's MCS employment, he received training in and developed computer applications using SQL, Oracle Forms 3.0, and Reportwriter 1.0.

The National Organization of Industrial Trade Unions ("NOITU") is an umbrella organization of which industrial trade unions are members. It provides various administrative services for its member unions. Among its services are to administer health claims payment, medical centers, and pension programs for members of its member unions.

NOITU invoices the employers of members of its member unions for welfare, dues, and pension fund contributions. Monies collected from the employers are used for the benefit of NOITU's member unions through the various fringe benefit programs that NOITU administers.

NOITU was a client of MCS before July 1991. MCS developed computer software that NOITU used in administering its fringe benefit programs.

Petitioner, as part of his duties for MCS, worked on matters for NOITU and dealt directly with NOITU's personnel.

In 1991, MCS underwent a business reorganization that resulted in the termination of petitioner's employment with MCS.

NOITU needed a programmer with petitioner's skills and, accordingly, it hired petitioner as an employee in 1991.

Petitioner and NOITU agreed that petitioner, who had served NOITU from Nashville in the past, would continue to be based in Nashville. His duties consisted of continuing to support the Basic Language programs that MCS had written for NOITU on a BTI computer; assisting the New York computer department manager in selecting a replacement computer, operating system, and application programming language; writing interface programs that facilitated the transfer of data from the old BTI computer to a new IBM computer; rewriting the health claims payment program in the Oracle SQL computer language; writing new pension tracking and annual reporting programs; and supporting all other computer programming areas, including membership maintenance, employer billing, and medical center applications.

NOITU's office was in Jamaica, New York. It also operated two medical centers, one in Manhattan and one on Long Island.

Petitioner and NOITU agreed that petitioner would come to NOITU's New York office only when needed to gather guidelines for revision of existing or creation of new computer programs, and to instruct NOITU's New York personnel in their use. In May of 1995, petitioner spent 19 working days in New York to assist with the one-time conversion from the BTI to the IBM computer.

Working as an employee of NOITU was petitioner's only business activity during the years at issue. He did not work for any other person or organization, either as an employee or as an independent contractor.

Petitioner set up an office in his home in Nashville to perform duties for NOITU. NOITU arranged with MCI Telephone Company to install a long-distance data line from its Jamaica, New York office to petitioner's Nashville office. Petitioner had a dedicated voice telephone that he used solely for business purposes. He had another telephone line for personal calls. Petitioner's Nashville office consisted of one room in his home. In addition to the MCI communication equipment, the office included two computer terminals, which were later replaced with a personal computer and a printer. Petitioner had his own desk but NOITU paid for a desk chair, a dry-mount wall board, and two 30" x 72" work tables. Office expenses, including a telephone and supplies, were reimbursed to petitioner by NOITU on a monthly basis.

Most of petitioner's computer programming work was done in Nashville. He traveled to New York for the purpose of instructing NOITU's New York personnel in the use of new or revised computer programs.

NOITU did not require petitioner to perform his work in Nashville. It would not have objected if he had performed it in New York. Petitioner's decision to do his programming work in Nashville rather than New York was made for personal reasons.

Petitioner's work for NOITU did not involve any administrative responsibilities for the New York office nor did he supervise New York personnel or have any involvement in the running and the management of the New York office.

His work involved preparing and revising computer programs that were used by NOITU and instructing NOITU's personnel in their use. In the course of his work he was in daily contact with NOITU's New York office by telephone.

Petitioner was not an officer or member of the board of directors of NOITU. He owned no stock or any other equity interest in NOITU, nor did he lend any money to NOITU.

Nashville is 900 miles from New York City. Published airline schedules indicate that a flight from Nashville to New York takes about two hours.

In a typical week, petitioner spent approximately 45 hours working for NOITU. Most of his work was done at his office in Nashville.

During 1994, petitioner worked 187 days in Tennessee and 59 days in New York.

During 1995, petitioner worked 180 days in Tennessee and 62 days in New York.

When petitioner came to New York on NOITU business, he stayed in a hotel near NOITU's office.

In 1994, petitioner came to New York eight times. His average stay was eight work days and his longest stay was ten work days.

In 1995, petitioner came to New York eight times. His average stay was 8 work days and his longest stay was 19 work days.

Petitioner filed timely Federal income tax returns for 1994 and 1995.

Petitioner filed timely New York State personal income tax returns for 1994 and 1995. On each return, petitioner allocated his wage and salary income to New York on the basis of the total number of days worked in New York over the total number of days worked in the year.

On or about November 28, 1997, the Audit Division of the Division of Taxation ("Division") mailed to petitioner statements of proposed audit changes for 1994 and 1995 which explained that there were deficiencies of New York State and New York City personal income tax. For each of the years in issue, the Division explained, in part, that days worked at home do not form a proper basis for allocation of income by a nonresident. According to the Division, "any allowance claimed for days worked outside of New York must be based on the performance of services which, because of the necessity of the employer, obligate the employee to out-of-state duties in the service of his employer." Upon applying this principle, the Division allocated the total amount reported by petitioner as wages, salaries and tips from his New York employment to New York State and New York City.

On or about April 6, 1998 and April 27, 1998, the Division mailed to petitioner notices of deficiency which asserted deficiencies of New York State and New York City personal income taxes as follows:

Date of Notice	Jurisdiction	Year	Amount of Tax	Interest	Balance Due
April 6, 1998	N.Y.S.	1994	$2,204.91	$590.88	$2,795.79
	N.Y.C.	1994	$ 202.53	$ 54.28	$ 256.81
April 27, 1998	N.Y.S.	1995	$2,182.66	$378.18	$2,560.84
	N.Y.C.	1995	$ 202.94	$ 35.16	$ 238.10

A conciliation conference was held on this matter before the Department of Taxation and Finance's Bureau of Conciliation and Mediation Services on March 16, 1999. On or about June 4, 1999, the Bureau of Conciliation Services mailed to petitioner a Conciliation Order sustaining the deficiencies proposed in the notices of deficiency.

On or about August 26, 1999, petitioner mailed to the Division of Tax Appeals a petition disagreeing with the proposed deficiencies and requesting a formal hearing.

On or about October 7, 1999, the Division of Taxation mailed an answer to the petition to the Division of Tax Appeals.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge analyzed the facts of this case, which are not in dispute, with the statute, regulations and applicable case law and found that the Division properly taxed petitioner herein. The Administrative Law Judge first addressed petitioner's argument that the source of income was dependent upon where the work was performed and not on where the person paying for the service was located. The Administrative Law Judge, relying on ***Matter of Speno v. Gallman*** (35 NY2d 256, 360 NYS2d 855), dismissed this argument stating that the current law demands that the convenience of the employer test be employed to determine whether tax liability arises in a certain case. Here, the Administrative Law Judge noted that petitioner's employer, NOITU, had its office in New York State and it operated two medical centers which were located in New York State. Petitioner worked in Nashville for personal reasons and, in fact, his employer

would not have objected to his working in New York. Moreover, petitioner concededly worked several days within New York for each of the years at issue. Thus, the Administrative Law Judge held that the convenience of the employer doctrine was properly applied by the Division in this case.

Petitioner further argued that the convenience of the employer test violated his due process rights. Petitioner claimed that not only was the test illogical, but, as applied to him, was unconstitutional because it resulted in taxing his income out of all proportion to his contacts and benefits from New York State. The Administrative Law Judge rejected this argument emphasizing that the source of petitioner's income was his New York State employer and, based upon the decision in ***Matter of Colleary v. Tully*** (69 AD2d 922, 415 NYS2d 266), that fact establishes the necessary connection with New York to impose tax on the income at issue herein.

Moreover, petitioner argued that the convenience of the employer test as applied to him violated the Equal Protection Clause of the United States Constitution by applying an irrational standard for distinguishing between taxpayers who can allocate income between New York State and elsewhere and taxpayers who cannot allocate. Petitioner asserted that the dividing line between people who can allocate their income and people who cannot is whether they are required to work out of state by their employer. The Administrative Law Judge rejected petitioner's interpretation of the convenience of the employer test. The Administrative Law Judge noted that the test is not whether an employee is required to work out of state by his employer, but rather, whether it is necessary to perform services out of state in the service of the employer.

Additionally, the Administrative Law Judge pointed out that the rational basis for the rule is that it protects the integrity of the apportionment scheme by including as taxable income receipts from services which are substantially connected to New York but which are performed outside of New York to effect a reduction in New York State taxes (***see***, ***Matter of Colleary v. Tully***, ***supra***).

Lastly, the Administrative Law Judge considered the issue of whether petitioner was entitled to recover reasonable administrative and litigation costs. The Administrative Law Judge denied such request by petitioner. The Administrative Law Judge reasoned that, pursuant to Tax Law § 3030(a), only a prevailing party is entitled to receive such costs and petitioner has failed to prove that he was a prevailing party in this proceeding. Accordingly, the Administrative Law Judge denied petitioner's petition in its entirety.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues the same issues that he presented to the Administrative Law Judge below. Petitioner states that New York can tax only that proportion of petitioner's income as it relates to the proportion of total working days that were spent within New York State. Petitioner claims that the taxing of 100% of his income, despite the fact that he spent only 25% of his working days within New York State, is in violation of both the Due Process Clause and the Equal Protection Clause of the United States Constitution. Additionally, petitioner argues that he is entitled to an award of reasonable administrative and litigation expenses since the Division's position in

this case flies in the face of not only the law, but its own audit guidelines.

The Division agrees with the determination of the Administrative Law Judge. The Division states that the convenience of the employer doctrine was properly applied to the facts of this case. The Division asserts that the wages of petitioner from a New York employer are taxable to New York since petitioner admits that he worked both within and without the state solely for his convenience. Furthermore, the Division emphasizes that the case law demonstrates that the convenience of the employer doctrine has been upheld as constitutional. Despite the assertions made by petitioner to the contrary, the Division claims that this case is clear cut due to its facts and that portraying the facts of this case as an issue of whether petitioner was within commuting distance from New York is inappropriate. Lastly, the Division states that petitioner's request for costs in this case is premature. Basically, since petitioner has not proven that he is a prevailing party, the Division argues that costs cannot be awarded to him. Therefore, the Division respectfully requests that the determination of the Administrative Law Judge be sustained.

OPINION

We affirm the determination of the Administrative Law Judge.

This case involves the doctrine of the convenience of the employer and whether such test was properly applied to the facts of this case. Tax Law § 631 defines the New York source income of a nonresident individual, in pertinent part, as "[t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross

income . . . derived from or connected with New York sources" (Tax Law § 631[a][1]). Furthermore, the statute further clarifies the phrase *Income and deductions from New York sources* to include those items attributable to "a business, trade, profession or occupation carried on in this state" (Tax Law § 631[b][1][B]). The Commissioner's regulations at 20 NYCRR 132.18(a) address the convenience of the employer doctrine and provide, in pertinent part, that:

> [i]f a nonresident employee . . . performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction . . . of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.

Petitioner asks us to focus on the fact that the taxpayer's place of business is not in New York which he claims distinguishes his case from the clear precedent in this area of law. Petitioner misinterprets the statute. The analysis of this case focuses on the fact that petitioner, a nonresident of New York State, is employed by a New York State employer and performs his job duties both within and without the State. As the stipulated facts to this case

indicate, petitioner resides in Nashville solely for his convenience and personal reasons. The fact that petitioner considered himself to be working principally in Tennessee is not dispositive in this case. The correct focus is that petitioner derives his income from the performance of duties for his New York State employer (***see***, ***Matter of Colleary v. Tully***, ***supra*** [wherein it was held that the income of an out-of-state self-employed person is taxable only through his intrastate activities since these activities are the connection with the State, whereas, the source of an out-of-state employee's income is the employer within the State]).

As noted by the Administrative Law Judge below, the case law has confirmed that the convenience of the employer doctrine is the proper test to determine the tax liability of a nonresident individual who is employed by a New York employer yet, for one's own convenience, chooses to perform his job duties both within and without New York. The Court of Appeals has held that:

> a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-State services are performed for the employee's convenience they generate New York State tax liability (***Matter of Speno v. Gallman***, ***supra***, 360 NYS2d, at 857-858).

Therefore, we disagree with petitioner that the facts of his case are unusual. We view this case as a textbook situation where a nonresident works for a New York employer both within and without the State for his own convenience

and, as such, was properly taxed on his income by the Division in this case.

Petitioner has tried to differentiate his case from the situation involving an individual who is within commuting distance to New York State and chooses to work at home rather than to travel into New York in an effort to avoid the resultant tax liability. Petitioner argues that since he is not a commuter, he should not be subject to the convenience of the employer doctrine. We reject this proposition.

Obviously, the statute does not address the issue as involving commuters. However, petitioner's assertion that since he resides 900 miles from New York and, thus, is not a person who is trying to avoid taxation by merely claiming to work at home rather than drive to work is not the focus of the statute or the case law. Clearly, the issue of how far away an individual lives from his New York State employer cannot control the outcome of this case. We are not at liberty to judge what is a commutable distance for employment for any particular individual and we will not interpret this rule as involving commuting. As stated above, the taxability at issue is resolved by a proper focus on whether petitioner was working in Nashville out of necessity to his employer or rather, as the facts herein establish, merely out of the convenience of the employee. For these reasons, we are not persuaded by petitioner's arguments and find that the Division properly taxed petitioner herein.

Petitioner continues to argue that the application of the convenience of the employer doctrine violates his due process rights by taxing his income out of all proportion to his contacts with and benefits from New York State. Petitioner states that:

> the Division conveniently ignores a basic Constitutional fact: that a state, while it can tax all of the income of a resident by reason of his residency, can tax the income of a nonresident only to the extent that the income is derived from business conducted within the state (Petitioner's brief in reply, p. 5).

Again, petitioner's argument is based upon a flawed interpretation of the statute. As we have reasoned above, it is the New York State employer from which petitioner derives his income that is the focus of the analysis. The fact that petitioner actually works in New York for a minority of his total working days is irrelevant when he is performing his duties both within and without the State for his New York State employer. As we have held, the convenience of the employer doctrine was properly applied to the facts in this case and as such we do not find that there has been a violation of the Due Process Clause as applied to petitioner herein.

Similarly, we reject petitioner's claim that application of the convenience of the employer doctrine violates the Equal Protection Clause. Petitioner maintains that such doctrine has the result of allowing some nonresidents to allocate their income between New York State and their state of residence while not allowing other nonresidents to do so based upon whether they are required to work outside New York State by necessity of their employer or for the employee's convenience. Petitioner claims that there is no rational basis for this distinction. However, the convenience of the employer doctrine serves to protect the integrity of the apportionment scheme and such doctrine has been upheld as valid (***see***, ***Matter of Colleary v. Tully***, ***supra***; ***see also***, ***Matter of Speno v. Gallman***,

supra). Accordingly, we reject petitioner's contention that there was a violation of the Equal Protection Clause.

The last issue raised by petitioner herein is a request for costs. Tax Law § 3030(a) provides for a discretionary award of attorneys' fees to a prevailing party in a proceeding in which the Commissioner is a party and which involves the determination, collection or refund of any tax. Petitioner's request for costs is denied since he has not proven that he is a prevailing party. Therefore, he is not entitled to recover any costs arising from this litigation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas L. Huckaby is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Thomas L. Huckaby is denied; and

4. The notices of deficiency dated April 6 and 27, 1998 are sustained.

DATED: Troy, New York
May 30, 2002

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition

of

GEORGE A.P. AND JOAN H. WALLACE

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1994 and 1995.

DTA NO. 817182

DETERMINATION

Petitioners, George A. P. and Joan H. Wallace, 101 Chestnut Street, Apt. C, Boston, Massachusetts 02108, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1994 and 1995.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on March 6, 2000 at 10:30 A.M., with all briefs to be submitted by July 1, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared by Becker & Company LLC (Alan M. Blecher, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly allocated to New York wage income earned by petitioner George A.P. Wallace, a nonresident of New York, for services performed at his Portland, Maine residence on the basis that

such services were performed at petitioner's residence for his convenience rather than out of necessity for his employer.

FINDINGS OF FACT

1. For each of the years 1994 and 1995, George A.P. Wallace and Joan H. Wallace filed joint nonresident New York State personal income tax returns.[1] On the 1994 return, petitioner claimed that out of 221 days worked for the year, 195 days had been worked outside New York. On the 1995 return, petitioner claimed that 193 days (out of a total number of days worked of 216) had been worked outside New York. During a subsequent audit of petitioner's returns conducted by the Division of Taxation ("Division"), petitioner indicated on forms AU-262.5 (Questionnaire – Allocation of Personal Service Compensation) that 160 out of the 195 days worked outside New York in 1994 and 166 days out of the 193 days worked outside New York in 1995 had been worked at his home in Portland, Maine.

2. As a result of the audit conducted by the Division which commenced in June 1997, the Division, on January 27, 1998, issued a Statement of Personal Income Tax Audit Changes to petitioners which asserted additional New York State personal income tax due in the amount of $20,308.80, plus interest, for 1994 and additional New

[1] Since the issue in the present matter relates to allocation of wage income earned by George A.P. Wallace for services performed at his Portland, Maine residence, all references to "petitioner" shall refer solely to Mr. Wallace.

York State personal income tax in the amount of $33,278.42, plus interest, for 1995. An explanation attached to the Statement of Personal Income Tax Audit Changes stated in pertinent part as follows:

> Regarding days worked at home, *Regulation Section 132.18* states that any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. Services performed at an out-of-state home which could have been performed at the employer's New York office is work performed for the employee's convenience and not for the employer's necessity. The fact that the employer also benefits from the arrangement or even requests the services be performed at home does not establish necessity as opposed to convenience. Consequently, days worked at home have been disallowed per *regulation section 132.18(a).*

3. On March 2, 1998, the Division issued a Notice of Deficiency to petitioners asserting additional New York State personal income tax in the amounts of $20,308.80, plus interest, for the year 1994 and $33,278.42, plus interest, for the year 1995.

4. Petitioner is employed by Wallace Eannace Associates, Inc. ("WEA") which was incorporated in the State of New York and which maintains its principal office at 50 Newtown Road, Plainview (Nassau County), New York. WEA is also licensed to do business in New Jersey and maintains a warehouse facility in Franklin Lakes, New Jersey. Since the inception of the business in about 1970, petitioner has acted as its president.

Petitioner is a graduate of the Engineering School of Cornell University and is a licensed professional engineer in New York State. He also studied advanced marketing management at Harvard University.

Prior to 1990, WEA maintained a small office in New York City where petitioner, then a New York City resident, worked. In 1990, after WEA closed this office, petitioner worked out of his New York City home. In July 1993, petitioners sold their co-op apartment in New York City and moved to a newly-purchased residence in Portland, Maine where they have resided continuously since that time. After July 1993, petitioners maintained no residence in New York State. Beginning with the calendar year 1994, petitioners have filed nonresident New York State income tax returns.

5. WEA is a sales/marketing and distribution company operating as the exclusive representative for a number of companies manufacturing technological equipment for fluid handling and motor control. One of WEA's major suppliers is ITT Fluid Handling ("ITT"), a division of ITT Corp. In 1975, WEA and ITT entered into an agreement whereby WEA became an independent representative of ITT. Pursuant to its terms, the agreement may be terminated by written notice whenever both petitioner and Samuel Eannace cease to be active as principals in WEA. Samuel Eannace died in 1988 leaving petitioner as the sole principal of WEA to deal with ITT.

The ITT territory of WEA consists of Northern New Jersey, the five boroughs of New York City, Long Island, Westchester County and other New York State counties up to Orange and Ulster.

6. In 1988, WEA implemented a business succession plan whereby petitioner would be relieved of the day-to-day management and other personnel would be developed as managers, thereby enabling petitioner to focus on other business areas. Petitioner became chiefly responsible for WEA's strategic planning. As previously noted, petitioner has, since 1990, maintained an office in his home (first in New York City and, since 1993, in Portland, Maine) to perform services on behalf of WEA. In his Portland, Maine home, petitioner has maintained two dedicated telephone lines for business calls and faxes which are separate from his residence telephone lines. WEA pays for leased telephone answering equipment and also purchased a fax machine and miscellaneous supplies for petitioner's office in Portland, Maine.

7. A major function of petitioner's job is to preserve WEA's relationship with ITT which represents more than 90 percent of WEA's business. Petitioner's contacts and visibility in the industry, including attendance at industry shows and conventions, are necessary for the ongoing WEA supply relationships.

8. During the years at issue, petitioner did, on occasion, work in New York. At the hearing, the parties stipulated that petitioner worked for WEA in New York on 26 days in 1994 and on 23 days in 1995.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioners assert the following:

a. This case is factually distinguishable from many of the cases which have held that nonresident taxpayers working at home for New York-based employers are required to treat such days

as days worked in New York because most of those cases involve nonresident commuters, i.e., taxpayers who live within reasonable commuting distance from their New York offices from which they are based. Petitioner's Portland, Maine residence is not within commuting distance of WEA's Plainview, New York office and, accordingly, he came into New York for a limited amount of days during the years at issue;

b. Petitioner cites to an Advisory Opinion rendered by the Division on June 30, 1999 (TSB-A-99[4]I) which involved a stockbroker who sold his New York residence, moved to Wyoming and worked out of his home, communicating with the New York office and his customers by telephone and fax. In that case, it must be noted that the stockbroker, unlike petitioner in the present matter, was not planning to return to New York at all after his move and would not perform services for his employer within New York State. The Technical Services Bureau of the Division's Taxpayer Services Division, citing Matter of Linsley v. *Gailman (38 AD2d 367, 329 NYS2d 486*, affd *33 NY2d 863, 352* NYS2d 199), held that the stockbroker's income would not constitute income from New York sources; and

c. Petitioner maintains that WEA desired to have petitioner focus on strategic planning, which purpose would be defeated if he was involved in the day-to-day operations of the company. Therefore, it was desired that he be off premises to avoid this day-to-day contact with many of the other employees. In light of the realities of the modern workplace, i.e., fax machines, telephones and computers, a more modern approach is needed when considering whether working at home

was for the convenience of the employee versus the necessity of the employer.

10. In response, the Division asserts that the fact that Portland, Maine is not within commuting distance from Plainview, New York is irrelevant since it was petitioner's choice to move to Maine. Petitioner has made no showing that the work performed at his home in Portland, Maine could not have been performed at WEA's Plainview, New York office. Therefore, petitioner's work was performed for his convenience rather than for the employer's necessity.

CONCLUSIONS OF LAW

A. Tax Law section 631(a) provides that the New York source income of a nonresident individual includes the net amount of items of income, gain, loss and deduction reported in the Federal adjusted gross income that are "derived from or connected with New York sources." Included among these items are those attributable to a business, trade, profession or occupation carried on in this State (Tax Law section 631[b][1]).

B. Tax Law section 631(c) provides, in part, that:

[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

C. 20 NYCRR 131.4(b) states:

> The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State. . . . Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 131.16 through 131.18 of this Part.

D. 20 NYCRR 132.18(a) provides:

> If a nonresident employee . . . performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. . . . However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay.

E. It is well settled that a nonresident employed by a New York employer is not subject to the convenience of the

employer test (as set forth in 20 NYCRR 132.18[a]) when he works outside of New York, performs no work in New York and has no office or place of business in New York (Matter of Linsley v. Gallman, supra; *Matter of Hayes v. State Tax Commn., 61 AD2d 62, 401 NYS2d 876).* In *Matter of Hayes (supra, 401 NYS 2d at 877)*, the Court, while noting that compensation for personal services rendered by a nonresident wholly without the State is not included in his New York adjusted gross income regardless of the fact that payment may be made from a point within the State, stated that "[o]nly when some work is performed within New York may some or all of the income be taxed in New York, and only then should respondent determine if work was performed for the employer's necessity."

Interestingly, the Advisory Opinion to which petitioner refers in his brief (see, Finding of Fact "9[b]"), cites to Matter of Linsley v. Gallman (supra). In *Matter of Hayes v. State Tax Commn. (supra, 401 NYS 2d, at 877)*, the Court noted that "the petitioner in Linsley was properly absolved of tax liability because he had no office in New York and performed no work here." Yet, petitioner in the present matter seeks to have the holding in Matter of Linsley v. Gallman made applicable to his case even though he, admittedly, performed work in New York during the years at issue. Accordingly, it must be found that because petitioner did perform work in New York, it is proper to apply the "convenience of the employer test" as set forth in 20 NYCRR 132.18(a).

F. The policy justification for the "convenience of the employer" test is that since a New York State resident is not entitled to special tax benefits for work done at home, a nonresident who maintains an office or performs services

in New York State should not be either (*Matter of Speno v. Gallman, 35 NY2d 256, 259, 360 NYS2d 855*). Because of the obvious potential for abuse where the home is the workplace at issue, a strict standard of employer necessity has been employed by the Division which, with rare exception, has been upheld by the courts *(Matter of Kitman v. State Tax Commn., 92 AD2d 1018 461 NYS2d 448).*

In the present matter, petitioner did not appear at the hearing and, accordingly, did not testify as to the actual duties and functions which he asserts could not have been performed at WEA's Plainview, New York office. In his brief, it is alleged that maintaining relations with all of WEA's suppliers and most notably with ITT, its most important supplier, is vital to WEA. The brief goes on to state that "Wallace does this by maintaining visibility in the industry, which by definition requires that he work other than at WEA's Plainview, New York location." The brief states that petitioner spends a considerable amount of time at industry trade shows and conventions, followed up with visits, correspondence and phone calls. Assuming the truthfulness of these statements, there has been no showing by petitioner why the correspondence or phone calls could not originate from WEA's home office in New York State.

Petitioner's brief further states that petitioner is chiefly responsible for WEA's strategic planning and that, as part of the business succession plan, WEA requires that he perform this strategic planning function off premises. A memorandum of Richard M. Rosenberg, Esq., counsel for WEA, states that the purpose of having petitioner focus on strategic planning would be defeated if he was to be involved in WEA's day-to-day operations and, therefore, it was desirable and required that he be off premises to

avoid day-to-day contact with the employees who had become accustomed to dealing with him on large and small business matters. Mr. Rosenberg's memorandum also states that this business succession plan commenced in 1988. However, it must be noted that petitioner worked in WEA's New York City office until 1990, at which time this office was closed and petitioner began working from his New York City residence. Later, in 1993, he moved to Portland, Maine and continued to work out of his home. In summary, the evidence produced by petitioner fails to adequately substantiate his allegations that his working out of his home in Portland, Maine was for the necessity of WEA and not for his own convenience. Perhaps petitioner's own memorandum, which was introduced into evidence at the hearing, contains the most accurate summary of the facts in this matter when it stated: "In my strategic planning position with Wallace Eannace Associates, Inc. & with today's advanced communications there is no need for me to work daily at my employer's office to function effectively." While there may be no need for petitioner to work daily at WEA's Plainview, New York office, it is his burden to prove that there is a need for him to work out of his Portland, Maine residence. Petitioner has failed to sustain this burden.

G. The petition of George A.P. Wallace and Joan H. Wallace is denied and the Notice of Deficiency issued to petitioners on March 2, 1998 is sustained.

DATED: Troy, New York
December 21, 2000

[Signature]
ADMINISTRATIVE LAW JUDGE

(2)

Supreme Court, U.S.
FILED
MAR 16 2004
OFFICE OF THE CLERK

No. 03-1177

In The

Supreme Court Of The United States

EDWARD A. AND DORIS ZELINSKY,
Petitioners,

v.

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF OF RICHARD BLUMENTHAL, ATTORNEY GENERAL OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) On days when New York's "convenience of the employer" rule risks double taxation of nonresident telecommuters for working at their out-of-state homes, does that rule, and the risk of double taxation the rule causes, violate the Commerce Clause?

(2) On days when New York's "convenience of the employer" rule risks double taxation of nonresident telecommuters for working at their out-of-state homes, does that rule, and the risk of double taxation the rule causes, violate the Due Process Clause?

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INTERESTS OF THE AMICUS CURIAE

The petitioner is representative of a growing part of our economy – persons who, because of the advances in technology, are able to work at home for all or part of a work week. Located adjacent to New York City, Connecticut is particularly effected by this trend. A large number of Connecticut residents commute every day to New York to work. An increasing number of those Connecticut residents take advantage of the opportunities and benefits of so-called "telecommuting." However, those who do are unfairly and unconstitutionally penalized by New York's use of the "convenience-of-the-employer" rule of income allocation for state income tax purposes.

The New York Court of Appeals attempts to lay this problem at Connecticut's door, asserting that the risk of double taxation of telecommuting Connecticut residents is the result of Connecticut's, not New York's, tax system. However, New York's efforts to sustain its system of double taxation of nonresidents and to deflect responsibility for this unconstitutional double taxation finds no support in this Court's longstanding principles on the limits of state taxation under the Commerce Clause and the Due Process Clause. Unless this Court takes up this matter, Connecticut's telecommuting residents will continue to be subject to New York's unconstitutional double taxation.

SUMMARY OF ARGUMENT

New York's insistence on using the fiction of the convenience-of-the-employer rule for apportioning a nonresident's income violates the constitutional limits on the extraterritorial reach of a state's taxing authority. Thousands of Connecticut telecommuting residents are burdened with the double taxation that is the result of New York's unconstitutional method of apportionment of their income. This petition provides the ideal opportunity for this Court to reaffirm those limits and to end unconstitutional burdens imposed by New York's apportionment methodology.

ARGUMENT

The petitioner is part of a growing and important part of the nation's contemporary workforce. Taking advantage of advances in information and telecommunications technology, he is able to spend part of his work week at a home office rather than commuting to his employer's place of business. He does so admittedly for his own convenience and not because his employer requires it. Like the thousands of other Connecticut residents who "telecommute," the petitioner benefits from this technologically driven opportunity. There can also be definite benefits to employers, in terms of improved morale and productivity, and to society, from a reduction in the deleterious impacts of traditional commuting. In general, telecommuting ought to be encouraged.

The State of New York, however, has a tax structure that burdens out-of-state telecommuters with double taxation. New York treats the portion of a nonresident's income that was earned while working outside of New York as having been earned within New

York unless the nonresident telecommuter was working out-of-state for his employer's convenience. Rather than apportion a nonresident's income on the basis of the portion of the time spent outside the state, New York sees fit to tax all of the nonresident's income. This so-called "convenience-of-the-employer" rule has the direct effect of imposing double taxation on thousands of Connecticut's telecommuting residents for that portion of their work week that is spent in Connecticut.

A state may tax the worldwide income of its residents; as to nonresidents, however, it may only tax the income derived from sources within the state. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312 (1937); *Shafer v. Carter*, 252 U.S. 37, 57 (1920). New York purports to tax the income of nonresidents that is "derived from or connected with New York sources. . . ." N.Y. Tax Law § 631(a)(1). As a general rule, when a nonresident partly works outside of New York, only that portion of his income that is attributable to the part of the work week spent working in New York is deemed income derived from New York sources. 20 N.Y. Comp. Codes R. & Regs. § 132.18(a) (Pet. App. 85). However, this apportionment is available under New York's tax laws only to the extent that "the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of the employer." *Id.* Thus, unless the employer requires, rather than permits, the employee to work out-of-state, the nonresident employee's income will be treated as New York income.

As is typical of states that have a personal income tax, Connecticut taxes the worldwide income of its residents. Conn. Gen. Stat. §§ 12-700 to 12-701 (2003). Connecticut allows a credit for taxes paid to another state for income derived from sources in that state. Conn. Gen.

Stat. § 12-704(a)(1) (2003). It does not allow a credit for taxes paid on income earned in Connecticut.

The result of New York's convenience-of-the-employer rule is that a Connecticut resident that works part of the time in New York and part of the time in Connecticut, but not at the demand of this employer, is taxed by both New York and Connecticut for that portion of his income earned while in Connecticut. The cause of this double taxation is not, as the court below opined, because Connecticut does not provide a credit all the income tax paid to New York. *See Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85, 96, 801 N.E.2d 840, 769 N.Y.S.2d 446 (2003) (Pet. App. 12). It is the direct result of New York's convenience-of-the-employer fiction, which treats income earned while working in Connecticut as income earned in New York simply because the nonresident employee is not required by his employer to work in Connecticut.

As demonstrated fully in the petitioner's brief, New York's convenience-of-the-employer rule runs afoul of this Court's precedent under both the Commerce Clause and the Due Process Clause. Under the Commerce Clause, a state's income tax must be fairly apportioned on the basis of the income that can be attributed to activity within the state. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Similarly, the Due Process Clause prohibits states from extending its taxing authority to value earned outside its borders. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 782 (1992).

New York's convenience-of-the-employer rule violates both of these constitutional limits on its taxing authority over nonresidents. It deems income earned out-of-state to have been earned in New York solely on the

ground that the employer did not require the nonresident employee to perform the work outside of New York. This fictional treatment of the location in which the income is earned, in stark contrast to reality, is not a fair basis for apportionment of the nonresident's income. *See Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948) (deeming transportation that passes through other states as commerce confined only to taxing state is "pure fiction" and is not a fair basis for apportionment of tax). Instead, it is little more than an unconstitutional attempt to extend the reach of its taxing authority extraterritorially.

Moreover, New York's unconstitutional apportionment rule cannot be made valid on the specious assertion that Connecticut, by not providing for a credit for any income tax paid to another state, has created the problem of double taxation. As this Court has made clear, it does not matter, for purposes of judging New York's tax laws under the requirements of the Commerce Clause and the Due Process Clause, what Connecticut's tax laws provide. The constitutionality of one state's taxation of nonresidents does not "'depend upon the present configuration of the statutes of another State.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 314 (1998) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 668 (1975)).

New York's convenience-of-the-employer rule has been justly criticized. A leading treatise concludes that the convenience-of-the-employer rule is not "an acceptable constitutional test for attributing an employee's compensation to a state for income tax purposes. . . ." 2 J. Hellerstein & W. Hellerstein, STATE TAXATION ¶ 20.05[4][c] (3d ed. 2002). It explains that:

> The crucial weakness in the convenience rule lies in the fact that it is not based on the

> benefits or protection state grants to the employer or the business, or the social costs the state incurs on their behalf. Such factors are likely to be identical whether the employee performs his services at home or on vacation, because of his own or his employer's convenience.

Id.

Thousands of Connecticut residents who wish to take advantage of the benefits of telecommuting are burdened with the double taxation that is the result of New York's unconstitutional method of apportionment of their income. This case presents the proper occasion for the Court to end New York's unfair taxation of nonresidents.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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